American Bar Association Journal

March 1950

globe *is a world map*

but Globe *is a newspaper*

You wouldn't write "Globe" with a small "g" when you refer to the name of a newspaper. With a lower-case initial, the word means a world map or a lamp shade—or several other things.

When you think of it this way, our request for the use of a capital "C" on "Coke" makes a lot of sense. Spelled with a lower-case "c," the friendly abbreviation for Coca-Cola has an altogether different meaning.

Like "Globe" as the name of a newspaper, Coke and Coca-Cola are proper nouns. Correct usage requires upper-case initials. And more—they are both registered trade-marks, and good practice requires the owner of a trade-mark to protect it diligently.

Coke = Coca-Cola

Both are registered trade-marks which distinguish the same thing and only one thing: the product of The Coca-Cola Company.

THE COCA-COLA COMPANY

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Fifty years of experience and hard work have shown the Commissioners on Uniform State Laws that men may propose uniform state laws, but the legislatures and the courts dispose otherwise—despite the best efforts of the leading scholars of the law. Justice Rossman of the Oregon Supreme Court analyses this problem in this article, and proposes renewed effort to secure uniformity with the promulgation of the new Commercial Code. (Page 175.)

New Commercial Code Is Described

"The most comprehensive act dealing with commercial law that has ever been prepared in any English-speaking jurisdiction" is now almost ready for its introduction by the lawyers of the United States. Prepared by the Commissioners on Uniform State Laws and the American Law Institute, the Uniform Commercial Code is designed to replace the separate uniform acts. The Code of course is of great importance, and every lawyer will welcome Mr. Schnader's analysis of its aim and contents. (Page 179.)

Willard L. King Writes Life of Chief Justice Fuller

Melville Weston Fuller was Chief Justice of the United States from 1888 to 1910—longer than any other Chief Justice in history except Marshall and Taney. Despite this, no biography of him has even been published. Mr. King has undertaken to remedy this neglect, and his book on the Chief Justice will be published shortly. This article concerning the family and early life of Fuller will be the first chapter of the biography. A later chapter from the biography will appear in a subsequent issue of the JOURNAL. (Page 183.)

Solicitor General Perlman Writes of *Habeas Corpus*

It is generally conceded that the writ of *habeas corpus* is one of our most important tools for preserving civil rights. During the recent war, many persons, both American citizens and aliens, were detained abroad by American authorities. It has never been settled whether federal courts can issue writs of *habeas corpus* to determine the legality of such detentions beyond the territorial jurisdiction of the courts. Solicitor General Perlman reviews the question in this interesting article. (Page 187.)

Mary Donlon Explains Why Social Laws Need Not Mean Socialism

Those who oppose what is called the "welfare state" avowedly do so because they fear that it means the end of free enterprise in this country; those who favor the welfare state allegedly do so because they believe that there is a basic minimum of security and living standards that it is society's responsibility to provide. Mary Donlon, Chairman of the New York State Workman's Compensation Board, places herself on the side of the latter group in this cogent article. (Page 191.)

Does the General Welfare Clause Authorize a Welfare State?

Article I of the Constitution of the United States gives the Congress the authority to "lay and collect Taxes, Duties, Imposts and Excises to . . . provide for the . . . general Welfare of the United States". The meaning of the phrase "general Welfare" has been disputed since the political controversy between Hamilton and Jefferson during the Administration of Washington. President Truman's recent citation of the clause in answer to criticism has once more stirred up a controversy that has never been really quiet. Mr. Lutz examines the meaning of the phrase in the light of its background and subsequent history. (Page 196.)

Oscar R. Ewing Replies to William Logan Martin

William Logan Martin, writing in the September, 1949, issue of the JOURNAL, declared that the proposed national health insurance program was unconstitutional. Oscar R. Ewing, the Federal Security Administrator, who has been one of the leaders of the fight to establish a nation-wide system of health insurance, presents his reasons for saying that Mr. Martin is wrong, and that the proposed insurance is entirely constitutional. (Page 199.)

W. G. McLaren Reviews the *Return of Adam Smith*

Is it true that *Das Kapital* has made *The Wealth of Nations* as obsolete as the quill pen with which Adam Smith wrote? A recent book prompts William G. McLaren of the Seattle Bar to express his conviction upon the trend toward leftist theory that is being taught in some American schools. George S. Montgomery, Jr.'s book, *The Return of Adam Smith*, serves as the springboard for this article in which Mr. McLaren calls attention to a serious problem. (Page 202.)

The Genocide Convention and the American Lawyer

Professor Kenneth S. Carlston of the University of Illinois doubts whether adoption of the proposed convention outlawing genocide will accomplish its purpose. He points out that the only place in the world today where genocide is practiced is the territory behind the Iron Curtain, where economic and political groups are systematically destroyed by the Soviet "democracy". In view of this, Professor Carlston wonders what will be accomplished by adoption of the Convention, other than adding to the international tensions of today. (Page 206.)

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Uniformity of Law:

An Elusive Goal

by **George Rossman** • Justice of the Supreme Court of Oregon

▪ Despite fifty years of work by the National Conference of Commissioners on Uniform State Laws, the goal of uniformity is yet only a dream. Justice Rossman finds that the obstacles athwart the road were placed there by the legislatures that adopt the uniform acts and by the courts that are called upon to interpret them. He suggests that promulging the new Commercial Code presents a good opportunity to renew efforts to secure more nearly uniform laws.

▪ Two and one-half years ago we passed the one hundreth anniversary of the birth of a judge, lawyer and legislative draftsman whose life's work was worthy of general recognition. The occasion should not have been permitted to pass unnoticed. He was MacKenzie Dalzell Chalmers, who, upon being knighted in 1906, became Sir MacKenzie Dalzell Chalmers. Although Judge Chalmers never lived in America, the effect of his work has touched virtually every commercial transaction in our country during the last half century.

Judge Chalmers, like many other notable lawyers, was the son of a clergyman. He was born at Nonington, England, February 7, 1847. He died in 1927. In the four score years that were given to him, Chalmers served as lawyer, judge, writer, civil servant and parliamentary draftsman. Even after he had drawn his last breath his good work continued, for his will bequeathed to Trinity College the largest sum given to that institution by any individual since it was founded in 1555.

Much as one is tempted to review the life of this interesting bachelor, we must move on to the phase of his work of immediate interest to the subject of this discourse. Early in his practice Chalmers became associated with Farrer Herschell, afterwards Lord Herschell. A suggestion made by that brilliant jurist interested Chalmers in drafting acts of Parliament. In 1878 Chalmers published a *Digest of the Law of Bills of Exchange,* which represented a study of 2,500 decisions and seventeen statutes. The volume included a statement of the controlling principles arranged in the form of propositions supplemented by commentaries. The excellence of his work won for Chalmers an invitation to address the Institute of Bankers, and following his address the Institute, together with the Associated Chambers of Commerce, commissioned him to draft a bill on the subject of bills of exchange. The act that he wrote followed the principles enumerated in his *Digest.* In 1882 Parliament adopted the act.

Through Herschell's influence, Chalmers became counsel to the Board of Trade, and while serving in that capacity played an important part in drafting the Bankruptcy Act which was enacted into law in 1883. Five years later he completed the writing of an act governing sales. It became known as the Sale of Goods Act. After Parliament had embraced it, it received the royal assent February 20, 1894.

The Bills of Exchange Act in the ensuing years was enacted in more than forty of England's colonies and dependencies. Thus there was achieved for all of those divisions of common law jurisprudence uniformity of legislation concerning commercial paper. The Sale of Goods Act underwent a comparable experience.

Chalmers' successful efforts in behalf of uniformity of legislation were followed by uniformity of judicial interpretation. Nothing is gained through uniform legislation if ultimately judicial interpretation in the various jurisdictions subject to the statute yields discordant views. When such is the eventual result, the purpose of uniform legislation is defeated. Judge Chalmers was fortunate. The Judicial Committee of the Privy Council has long maintained uniformity of construction through-

out the British Empire. Uniform interpretation followed in the wake of the enactment of Chalmers' statutes, and thus there was achieved uniformity of law.

To have encompassed for a nation made up of many jurisdictions uniformity of law in such important branches of jurisprudence as the law of sales and the law merchant is no mean accomplishment. To have shown by precept to nations such as ours how uniformity can be gained is a service worthy of recognition.

Uniformity of Law Is Needed in America

No argument is needed to show the pressing need for uniformity of law in America concerning commerce. Highways by land, water and air extend everywhere. Over them flows a constant movement of people and goods. Still other highways in the form of wires reach in all directions and are the avenues that carry intelligence and electrical power. Much of our commerce moves across state lines. Never before has commerce been so peripatetic and never before have so many people emulated the nomads.

State boundaries are the artificial creatures of the law and are justifiable only to the extent that they serve useful purposes. The expanding activities of our people threaten to burst the hems that the law terms boundaries. As Judge Lyman D. Brewster, the great American proponent of uniform laws, said a half century ago, "Science and invention, steam and electricity know nothing of state boundaries." State boundary lines with their concomitant state law must not be permitted to hamper needlessly the contributions to the common welfare that can be made by science, invention, commerce, industry and transportation. When the diverse and discordant laws of three or four states affect a transaction, confusion, delay and expense may be wasteful results. Those who wish commerce to function with a minimum of wasteful uncertainty have two choices as remedies—congressional legislation or uniform state laws. Congressional legislation involves a further expansion of our central Government and a further deprivation of the local courts of jurisdiction. Uniform laws have a tendency to crystallize the law and render it impossible for each state to experiment freely with its development. Of course, that objection is equally applicable to a national law adopted by Congress.

State Boundaries Are Artificial

Our state boundaries do not separate from each other people of divergent languages, dress, type and customs. When one crosses a state line he does not encounter there people of different aspirations who employ a different social system. Only the artificial boundary lines separate us and only the fact that the people of one state are called Ohioans and those of another by a different state name distinguishes us. The westward migrations of people who first established themselves firmly upon the Atlantic Coast carried to the mid-continent and then on to the Pacific Coast their customs, institutions and conceptions of government. Upon all fundamentals we have uniformity. Travel, commerce, education, common aspirations and our economic system have unified our people. Our industrial activities tend to fuse our many communities into a single one. Provincialism for the most part has disappeared and even the state boundary line is beginning to fade.

Notwithstanding these developments, we still refer in the courtrooms of our state courts to a sister state as "a foreign jurisdiction". The general purpose of the reference is entirely proper, but, unfortunately, the phrase plays its part in other phases of our thinking. In state jurisdiction we yield ground most reluctantly to the pressing need for uniformity. Pride in local traditions, veneration for the state's history and fond attachment to ancient decisions of the local court exert a powerful influence in the maintenance of a local body of law. Any state would spurn as an affront to the intelligence of its people a suggestion that it duplicate, word for word, some of the law of a sister state. So far as dissimilarity of law has its basis in reason, no one can expect a change, but some of the divergence is the result of accident and some of mistake.

Even though commerce, education, science and industry have found new channels and have lost their local character, state law insists upon preserving its local character. It prizes highly its individualistic traits, although it would scorn an intimation that it is, in fact, the last refuge of provincialism. Although our common economy and the nation-wide scope of our daily activities have welded our people into "a more perfect union", state law often refuses to lift its vision above the state boundary line. In the construction of statutes it seemingly attaches no significance to the words of the preamble which speak of a purpose to effect a more perfect union. One result of all of this is the constant trek to Washington with our problems.

Purpose of Uniform Laws Is More than Convenience

It is worthy of note that uniform laws serve a greater purpose than the convenience of business concerns that deal with each other. The preamble to our Constitution proclaims a purpose to "form a more perfect union, establish justice, insure domestic tranquillity". Uniformity of law in every nation where it has been employed has been a powerful force in effecting "a more perfect union". It is equally capable of insuring domestic tranquillity. Accordingly, the statement is repeated that any lawyer who has succeeded in achieving for a nation uniformity of law has to his credit a great accomplishment.

While Judge Chalmers was laboring in England in behalf of uniformity of law, efforts were being made in America to achieve a similar result here. In 1878 when Judge Chalmers published his digest, the American Bar Association was or-

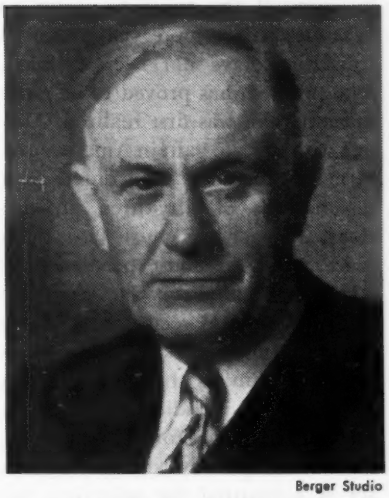
ganized, and its founders wrote into its Constitution this provision: "Its object shall be to . . . promote the administration of justice and uniformity of legislation and of judicial decision throughout the Nation." In 1881, a committee of the Alabama State Bar Association brought the problem of uniformity to the attention of all other similar associations. In 1884, a member of the American Bar Association from New Orleans introduced a resolution instructing the Association's Committee on Commercial Law to prepare a uniform statute on commercial paper. In 1889, the Association appointed a committee on uniformity of law, and in 1890, the legislature of New York authorized the appointment by the governor of that state of commissioners on uniformity of legislation. That act showed the course which must be pursued if uniformity of legislation was to be obtained. In 1890 the Association adopted a resolution which urged all states to take action similar to New York's. By August 24, 1892, seven states had followed New York's example, and on that day the first Conference of Commissioners on Uniform State Laws convened. In 1895 the Conference adopted a resolution which authorized the appointment of a committee charged with the task of drafting an act patterned upon the English Bills of Exchange Act. The committee that was appointed had as its chairman Judge Lyman D. Brewster and employed as draftsman J. J. Crawford of New York City, a recognized authority on the law of negotiable instruments. Today, when draftsmen deservedly command large remuneration and devote several years to an assigned task, it is startling to find that Mr. Crawford received for his work only one thousand dollars and that he completed his assignment in about a year's time. Among the records of the Conference is this entry: "The careful and skilful work of Mr. Crawford was done for a thousand dollars so that we have not to call for any of the subscriptions volunteered by individual members at our meeting last summer."

Mr. Crawford completed his draft by December of 1895. He had taken as his matrix a California act and had annotated each paragraph of his draft with citations to decisions, textbooks and legislative enactments. A committee studied the results of his labors and mailed copies of his draft to all who manifested an interest. When the Conference convened in Saratoga Springs in August of 1896 the draft received several days' consideration and was then adopted. At the same time Judge Brewster was elected president of the Conference. His brilliant intellect enabled him to become an effective champion for the Negotiable Instruments Law, the first comprehensive measure written by the youthful organization. Connecticut, the home state of Judge Brewster, was the first to adopt the Uniform Negotiable Instruments Law. Possibly Connecticut's prompt enactment into law of this pioneer uniform act contains a useful suggestion as to how we should go about the business of procuring legislative enactment of uniform measures. Judge Brewster was not only a skillful lawyer, but had been for many years a member of the Connecticut legislature. In fact, he had served for two terms as chairman of the judiciary committee of the Connecticut senate. All who have ever sought to induce legislative action have observed the value of legislative experience. It may be that the Conference should welcome into its ranks some legislators.

Conference Has Drafted One Hundred Acts

Since it was organized in 1892 the Conference has drafted one hundred acts. Some have been superseded by acts written more recently, and some enlisted such slight interest that they have been withdrawn. Still others have been found unsuitable as uniform acts and have been reclassified as model acts. Two acts promulgated in 1906 are particularly worthy of mention. One of them is the Sales Act, patterned upon the English Sale of Goods Act, which was written by Judge Chalmers, and the other is the Warehouse Receipts Act. Both have proved their merit. Only three acts written by the Conference have met with wide acceptance. Of these three, only the Negotiable Instruments Law has been enacted in all jurisdictions. The Warehouse Receipts Act has been adopted in forty-nine jurisdictions and the Stock Transfer Act in forty-six. The Sales Act, notwithstanding its excellent provisions and the need for uniformity of the law of sales, has been enacted in only thirty-seven jurisdictions. In contrast to its lack of general acceptance, the Uniform Declaratory Judgments Act, which was drafted sixteen years after the Sales Act and which deals with a subject for which there appears to be no need for uniformity, stands out. It has won as wide acceptance as the Sales Act. The element of timing may be the explanation. Acts offered for adoption when a need for them is urgent are bound to find acceptance, but stale acts, like stale merchandise, go begging.

The hopes of those who expected that the Conference would give the nation homogeneous laws and there-



Berger Studio

George Rossman has been a member of the Oregon Supreme Court since 1927. He was Chairman of the Association's Section of Judicial Administration in 1942. A graduate of the University of Chicago Law School, he was admitted to the Oregon Bar in 1910. He is a frequent contributor to the *Journal*.

by forestall the trend to resort to Washington for more Congressional legislation have not been fulfilled. The problem has proved to be more difficult than was first realized. Anyone who seeks to gain in America uniform state laws is confronted with the hazards of fifty-three jurisdictions; in fact, he must face them twice. First, he must persuade the legislative bodies of the fifty-three jurisdictions and secure from them the uniform enactment of his measure. Next, unless there comes from the various jurisdictions uniform construction, his efforts fail.

Not infrequently when a uniform act is submitted for adoption the members of the legislature do not realize the necessity for adopting the act without making changes in its contents. Frequently the lawmaker regards the proposed act in the same way that he views all others and feels free to rewrite its provisions to any extent that local interests suggest. Whenever tinkering takes place with a uniform act it loses its character as such. Although the records of the Conference show that the Negotiable Instruments Act has been enacted in fifty-three jurisdictions, several of the fifty-three made changes in its provisions before adopting it. For instance, Illinois yielded to some of the attacks which Professor James Barr Ames made upon the measure and rewrote some of its provisions in conformity with his views.

Further, after a uniform act has been adopted in a state, a subsequent session of the legislature of that state may become oblivious of the fact that the measure was adopted for uniformity purposes and amend it. Thereby uniformity is lost, although the title of the act which proclaims it as a uniform measure is retained. The Uniform Narcotic Drug Act is an example. The records show that it has been adopted in forty-five jurisdictions. In at least one of those jurisdictions important changes were made in the act before it was adopted, which occurred in 1935. For instance, there was omitted from it Section 24, which reads: "All acts or parts of acts which are inconsistent with the provisions of this act are hereby repealed." In 1931 the state in question had adopted a comprehensive statute upon the subject of narcotic drugs and, hence, when the state deleted from the uniform act Section 24 it kept intact its 1931 legislation. In 1941 this state amended four sections of its distorted version of the uniform act. In 1942 the Conference amended the uniform act and in 1945 the state in question again amended its act. Notwithstanding all the foregoing, one section of this state's statute says: "This act may be cited as the 'Uniform Narcotic Drug Act' " and another says: "This act shall be so interpreted and construed as to effectuate its general purpose, to make uniform the laws of those states which enact it."

Uniformity of Construction Is Essential

As said in a previous paragraph, uniformity of construction is as essential as uniformity of enactment. The state courts are independent of each other and the only provisions of the Federal Constitution that may induce uniformity of interpretation are Article IV, Section 1, and Section 1 of the Fourteenth Amendment. Neither of those provisions has any bearing upon most transactions that are governed by uniform laws and, accordingly, for all practical purposes, state courts are independent of each other. They are free to place upon statutes any construction which they deem proper. Only the rule of precedents has a tendency to induce a court to accept the construction placed by another court upon a similar enactment. But sometimes the decisions of other courts are not cited. An examination of briefs filed in appeals governed by uniform acts shows that it frequently happens that counsel do not mention the fact that the statute under consideration was enacted for the purpose of bringing about uniformity of law. Or, a court may attach less importance to the clause of the act which invokes uniformity of construction than it does to local traditions and former local decisions. In short, uniformity of legislation has not always yielded uniformity of law.

Professor Charles Merriam, the noted authority upon political science, after mentioning the fact that uniformity of legislation had not reached its intended goal, declared that the Conference discovered that fact "to its sorrow—and wrath." An extensive report made by one of the commissioners and printed upon the direction of the Conference dwelt upon the ever-increasing number of decisions which were construing the Negotiable Instruments Act, and then said: "With the passage of time, these decisions began to reveal an unexpected and formidable peril. The whole fabric, the very conception of uniformity, was being menaced by the strange attitude of the courts. Once more the Hydra-heads of uncertainty were showing themselves: the courts, on identical statutes, were reaching diametrically opposite conclusions; cases from other states on the precise point were being ignored; the very statute was ofttimes neglected, and matters clearly within its language were being disposed of on the bases of ancient decisions." A perusal of the annotations to the uniform acts published in the volumes entitled *Uniform Acts Annotated* will show that the Conference's disappointment with the judicial decisions had foundation.

In an effort to induce uniformity of judicial interpretation, the Conference, beginning with its promulgation of the Sales Act, included in all of its new ones a provision which declares: "This act shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it." Unfortunately, that clause, which occurs near the end of the act with some miscellaneous provisions, is often overlooked; especially after the act has been placed in a compilation of laws. When the Conference took the action just mentioned it created a committee on the subject of Uni-

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The New Commercial Code: Modernizing Our Uniform Commercial Acts

by **William A. Schnader** • of the Pennsylvania Bar (Philadelphia)

▪ For more than half a century, American law has profited from the work of the National Conference of Commissioners on Uniform State Laws. The Conference has proposed about one hundred uniform acts, many of which have been widely adopted throughout the Union. In 1950, its most ambitious plan—a new Commercial Code—will be submitted to the Association for its endorsement. Mr. Schnader describes the new Code in this article.

▪ Among the American Bar's most notable achievements has been its success in the field of uniform state commercial law. True, the result has not been complete uniformity, but much has been accomplished. All the states have enacted the Uniform Negotiable Instruments Law, the Uniform Warehouse Receipts Act and the Uniform Stock Transfer Act, and thirty-six states have enacted the Uniform Sales Act.

And these are not all the uniform acts on commercial subjects which, through the years, the National Conference of Commissioners on Uniform State Laws has prepared and the American Bar Association has endorsed and recommended to the legislatures of the states for enactment. The additional acts include the Uniform Bills of Lading Act, the Uniform Trust Receipts Act, the Uniform Conditional Sales Act and the Uniform Chattel Mortgage Act. The first two have been widely adopted, and the last two have been used as models by a number of states.

Now, lawyers of the American Bar are about to present to our legislative bodies the most comprehensive act dealing with commercial law that has ever been prepared in any English-speaking jurisdiction—the proposed Uniform Commercial Code. It is with the need for and the content of this proposed Code that this article will deal.

The Uniform Negotiable Instruments Law was prepared and promulgated in 1896, more than a half-century ago. The Uniform Sales Act was promulgated by the National Conference and endorsed by the American Bar Association in 1906—more than forty years ago—but this act was only a slight revision of the English Sale of Goods Act of 1893. Accordingly, both of these acts were prepared against the background of commercial practices in vogue in the latter part of the last century before the days of the automobile and before the revolutionary changes in communication brought about by the airplane and the radio had been dreamed of. During no period in the world's history prior to the last fifty years was the tempo of living stepped up to a comparable degree. Necessarily, commercial transactions, which constitute so great a part of the activity of the world, have not escaped the effects of the increase in speed which characterizes so much of life's experience. It would be miraculous if acts prepared before the turn of the century to regulate commercial paper and sales of goods would be adequate in 1950.

Much Commercial Legislation Not Covered by Uniform Acts

In addition, during the past half-century a considerable volume of legislation on commercial subjects was enacted entirely outside of the uniform laws which have been mentioned. Much of it was enacted and indexed under other titles. For example, many of the statutes recommended by the American Bankers Association were adopted as parts of the banking laws of the states, although the necessary effect was to modify, as far as banks are concerned, some of the rules of the Uniform Negotiable Instruments Law. Similarly, legislation dealing with the negotiability of the corporate bond is found in statutes relating to the issuance of obligations by particular types of corporations or in statutes relating to corporate securities. Thus, there has come about a definite need for integration with, as well as for modification of, the uniform acts.

Finally, many things which ought to be included in statutes regulating the various aspects of commercial law rest entirely in the field of decisional law, and some of them are not dealt with there. This is especially true in the law of sales, as evidenced by the fact that at least forty per cent of the Code's article on sales is matter not covered by any previous statute.

Indeed, the necessity for the revision of the Uniform Negotiable

Instruments Law and the Uniform Sales Act was sensed more than a decade ago. In the 1930's there was serious talk of undertaking the revision of these two acts. However, it was not until 1940 at the fiftieth annual meeting of the National Conference of Commissioners in Philadelphia that a proposal was made to prepare a uniform commercial code that would embrace a modernization of the Negotiable Instruments Law, the Sales Act and all the other commercial acts that the Conference had prepared, and which would fill in the gaps where modern business finds no convenient statutory law covering new types of transaction.

The Conference promptly adopted the proposal, and decided to engage upon the project as soon as funds should become available in an amount adequate to do the work.

The following year the Conference invited the American Law Institute to make the Code a joint undertaking. The invitation was accepted, and, pending the raising of funds requisite for the entire project, both bodies in 1942 embarked preliminarily upon a joint consideration of what was then known as the Revised Uniform Sales Act, and is now Article 2 of the Code.

The fund raising was committed to a ways and means committee appointed by the president of the American Law Institute. In 1944 the committee reported that it had received subscriptions for a total of $350,000, which it believed would be sufficient to finance the work, estimated to require five years for completion. Of this amount, $250,000 was granted by The Maurice and Laura Falk Foundation of Pittsburgh, and the remaining $100,000 was contributed by the Beaumont Foundation of Cleveland, Ohio, and by ninety-eight business, industrial, financial and transportation concerns, and law firms.

Work Began in 1945

Work on the Code as such began on January 1, 1945. The commitment to complete the Code in five years has not quite been fulfilled as the Code will not come up for final adoption by the National Conference and the Institute until their joint meeting in Washington in May of this year, or for endorsement by the American Bar Association until its Annual Meeting this fall.

At the outset, two questions loomed large in the minds of those charged with the responsibility for shaping the policies to be followed in the prepartion of the Code.

One of the questions had really been settled in advance when it was determined that a code should be prepared.

Would it be better to prepare one comprehensive act on all phases of commercial law rather than to attempt to modernize the separate acts on negotiable instruments, sales, warehouse receipts, bills of lading, stock transfers and trust receipts, and prepare additional acts on subjects not satisfactorily covered by any existing uniform act?

As previously stated, the Uniform Negotiable Instruments Law was promulgated in 1896. Its first enactment came in 1897 when five states adopted it, but it was not until 1924 that the last of the forty-eight states enacted it. The Uniform Warehouse Receipts Act was submitted to the legislatures in 1906. It was enacted by five states in 1907, but it required a period of thirty-eight years to obtain its enactment by all the states. In 1909 the Uniform Stock Transfer Act was proposed. It was not until 1947 that the last state enacted it. The Uniform Sales Act was promulgated in 1906, and while two states adopted it the following year, in 1950 it is the law of only thirty-six states.

This bit of history will demonstrate conclusively the difficulty of piecemeal adoption by the states of uniform acts on subjects even as popular with our legislative bodies as the uniform commercial acts have been.

Amendments to Uniform Acts Are Not Adopted

An even more pointed illustration of the difficulty lies in the fact that in 1922 amendments to the Uniform Warehouse Receipts Act were proposed by the National Conference and endorsed by the American Bar Association. Although the Uniform Warehouse Receipts Act is now on the statute books of all of the states, less than twenty have adopted the amendments proposed in 1922.

Similarly, although amendments to the Uniform Sales Act were promulgated in 1922, they were enacted by less than half the states in which the act is in force.

It was the feeling of those who settled this underlying policy question that it would be far less difficult to procure the enactment of a Uniform Commercial Code than it would be to persuade legislatures to enact revisions, act by act, of the statutes governing commercial paper, sales, warehouse receipts, stock transfers, and so on.

The second fundamental question bears a close relation to the first.

Would it be preferable to attempt to retain, with modifications and amendments, the existing language of the Negotiable Instruments Law, the Sales Act, the Warehouse Receipts Act, and the other uniform acts, or to restate in new form this vast field of the law?

To this question, much careful thought was given.

The two most important chapters of a Commercial Code would necessarily be the chapters on commercial paper and on sales—the subjects now covered by the Uniform Negotiable Instruments Law and the Uniform Sales Act.

Sales Act Proved To Be Hard To Interpret

The present Sales Act was, as previously pointed out, a slight revision of a foreign law. Its language is not easily understood, and its interpretation has given the courts plenty of work. Indeed, but for Professor Samuel Williston's monumental work on the law of sales—which in many respects has been more valuable to the Bench and Bar than the text of the act itself—many lawyers feel that the Uniform Sales Act would long ago have been supplanted

by an act more realistically conceived and more clearly drafted.

Even with Professor Williston's guidance in the interpretation of the act, there are dozens of sections regarding the meaning of which courts of different states have reached diametrically opposite conclusions.

And by actual count, there are eighty sections of the Uniform Negotiable Instruments Law that have different meanings in different states resulting from different court interpretations of the same language.

With this background, those responsible for determining the policy of the new Code felt that there was little, if anything, to be gained and much to be lost by attempting to do a repair job on the old laws rather than to start afresh and build the Code anew from the ground up.

In any event, in view of the great amount of new statutory material which the Conference and the Institute felt should be integrated into and made parts of the existing uniform acts, it would have been virtually impossible to do anything resembling a workmanlike job, if the method had been the retention of the framework and existing language of the old statutes. The result would have been a legislative crazy-quilt instead of a readily understandable piece of statutory drafting.

Laymen Should Understand Code as Well as Lawyers

The effort has been to write the Code in language that can be readily understood, not only by the trained lawyer, but also by those whose daily commercial transactions it governs.

The entire memberships of the American Law Institute and of the National Conference of Commissioners on Uniform State Laws have, during the last five years, devoted a large part of the time of these two organizations to the detailed study of the language as well as the policy of the various chapters of the Code. The judges and the practicing lawyers who have worked on the Code believe that the task of reading and studying it will not be unduly onerous. Copious comments follow every section which state what parts of prior uniform commercial statutes the sections replace, and whenever previous statutory language has been rephrased, the reasons for the changes. These comments are designated in the Code itself "Official Comments", and it is provided in Section 1-102 that they "may be consulted by the courts to determine the underlying reasons, purposes and policies of this act and may be used as a guide in its construction and application".

There will be a few members of the Bar, and especially some of us who are reaching an age when new ideas seem less desirable, who will regret the intrusion of different statutory provisions into a field of law which we regard as "settled". However, it is to be hoped that the great majority of lawyers will appraise the work solely on its merits.

Presently, the Code contains the following articles:

Article 1. General Provisions.
Article 2. Sales.
Article 3. Commercial Paper.
Article 4. Deposits and Collections.
Article 5. Letters of Credit.
Article 6. Foreign Banking.
Article 7. Documents of Title.
Article 8. Investment Securities.
Article 9. Secured Commercial Transactions.
Article 10. Bulk Sales.[1]
Article 11. Effective Date and Repealer.

These articles will fully cover the territory now occupied by the Uniform Negotiable Instruments Law, the Uniform Sales Act, the Uniform Warehouse Receipts Act, the Uniform Bills of Lading Act, the Uniform Stock Transfer Act, the Uniform Trust Receipts Act, the Uniform Conditional Sales Act, and the Uniform Chattel Mortgage Act.

In addition, as indicated, there will be articles on deposits and collections, letters of credit, foreign banking and perhaps bulk sales—subjects with which uniform acts have not heretofore dealt.[2]

Scope and Objectives of Code Are Explained

Now for the scope and general objectives of the several articles of the Code.

Article 1—General Provisions—deals with matters relating to the construction, interpretation and application of the Act. Several sections call for special mention.

Section 1-108 provides that, generally speaking, the rules contained in the Code are mandatory, unless they are qualified in the text by the words "unless otherwise agreed" or their equivalent. There are, of course, exceptions necessary to prevent interference with essential freedom of contract.

The purpose of this section is to put an end to the all too prevalent practice of including in fine print or "boiler plate" in contract forms, terms waiving or modifying fundamental provisions of statutory law

Photo Crafters

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1. The question is still being debated whether a Commercial Code should contain an article on bulk sales. Some feel that the law of bulk sales relates more to the field of bankruptcy and insolvency than it does to the field of commercial transactions. Others believe that to be complete, the Code should provide the steps which must be taken in the case of a bulk sale to give notice to creditors who might be adversely affected by the sale.

2. It is true that there is what is called a Uniform Bank Collection Code prepared by the American Bankers Association; but it was not a uniform act prepared by the National Conference of Commissioners on Uniform State Laws and endorsed by the American Bar Association, as were all the uniform acts to which reference has heretofore been made.

which would otherwise govern the transaction.

Section 1-203 provides that "Every contract within this Act imposes an obligation of good faith in its performance"; and good faith is defined in Section 1-201 as "honesty in fact in the conduct or transaction concerned". The definition then continues to say that good faith includes "observance by a person of the reasonable commercial standards of any business or trade in which he is engaged". This is a new provision and quite an advance over existing statutory law.

Probably the most far-reaching section in Article 1 is Section 1-205 entitled "Course of Dealing and Usage of Trade". The nub of this section is Subsection (4) which provides that unless contrary to a mandatory rule of the Act, "a course of dealing or usage of trade gives particular meaning to and supplements or qualifies the terms of" an agreement relating to a commercial transaction.

This section renders the entire Code flexible to a degree not hitherto achieved in any similar statute. As new usages of trade grow up, automatically they become part and parcel of agreements covering commercial transactions of the kind involved in the new usage, unless they violate a mandatory rule of the Code; and it is hard to imagine how a usage of trade could develop if it violated the mandatory rules of a code governing transactions in the trade.

In a word, Sections 1-203 and 1-205 illustrate the essential orientation of the entire Code towards the actual practices of businessmen as its central and dominant theme.

Other provisions in Article 1 require the Code to be liberally construed to achieve its primary purpose, namely, to make uniform throughout the United States all types of commercial transactions.

Article 2 Is Revision of Sales Act

Article 2 is a complete revision and modernization of the Uniform Sales Act.

Not only is the content of the old Uniform Sales Act completely rearranged, but there are many sections of the article which are completely new. In fact, there are no less than forty-three sections of this article which have no statutory ancestor. As previously stated, this represents approximately 40 per cent of the article.

Besides the new material in the sales article—material to bring the law of sales abreast of today's commercial practices—an effort has been made to clarify ambiguities in the existing uniform act, and where such ambiguities resulted in a difference of construction by courts of different jurisdictions, the new article makes it clear which rule is to be applied henceforth.

Basic in Article 2 is the abandonment of the idea of the theoretical passing of title to property in personalty as the test of the legal status of sales transactions. Instead, the Code treats the law of sales as the law of the formation and performance of a commercial contract of sale. In addition, throughout the sales article—indeed very largely throughout the Code—a distinction is made between the legal effects of the acts of a merchant or other "professional", and the acts of a consumer or other person who is not a professional in the field, the theory being that the law should deal more strictly with acts done by "professionals" than with acts done by others.

In the preparation and consideration of the article on sales, the draftsmen and the members of the coöperating bodies had the assistance and coöperation of associations of merchants and others vitally interested in having this important branch of the law made current with prevailing trade practices. Special mention should be made of the assistance and coöperation received from the Commerce and Industry Association of New York.

Article 3 Replaces Old N.I.L.

Article 3 on commercial paper covers in part the territory formerly occupied by the Uniform Negotiable Instruments Law.

All provisions in the existing N.I.L. relating to securities, as distinguished from what is commonly known as commercial paper, have been omitted from this article and are covered by the provisions of Article 8 on investment securities.

Much of what has been said regarding the article on sales applies equally to the article on commercial paper.

A contribution made by this article is the correction of the great body of nonuniform law resulting from diverse court decisions interpreting the N.I.L. In all of these cases, as in the article on sales, the present Code makes a choice between differing rules resulting from different interpretations.

Article 4 on deposits and collections deals with bank collections and also covers some of the relations between a customer and his bank, integrating with the provisions relating to bank collections and with Article 3 on commercial paper, many provisions of widespread existing legislation, covering such matters as payment of "stale" checks, liability of a bank for wrongful dishonor of a check, and stopping payment on checks.

Since the subject covers a great variety of different transactions, in order to provide flexibility for unusual but necessary action, wide latitude is given for variation of the rules by contract between the parties. The only exceptions are those few cases where sound public policy requires a prohibition of contrary agreements. The attempt of the Code is to state in modern terms the rules governing the great bulk of the usual transactions so as to eliminate the necessity for contractual provisions in fine print on the operating forms used by banks.

Article 5 on letters of credit is new in its entirety. It covers a field of growing importance in which there are no statutory rules and relatively few court decisions.

Especially in these days when there

(Continued on page 252)

Melville Weston Fuller:

Chief Justice of the United States, 1888-1910

by **Willard L. King** • of the Illinois Bar (Chicago)

■ No biography of Chief Justice Fuller has ever been published despite the fact that he served a longer term than any Chief Justice of the United States except Marshall and Taney. Mr. King has for many years been collecting material for such a biography which will be published shortly by the Macmillan Company. This contribution will be the first chapter of that book.

■ On May 21, 1830, *The Kennebec Journal*, a weekly of Augusta, Maine, carried this item:

> Married . . . In this town on Monday morning last by the Rev. Mr. Tappan, Frederick A. Fuller, Esq. to Miss Catharine M. Weston, daughter of Nathan Weston, Jr.

It was not then customary for a newspaper to print the local news. This journal is full of Federalist vitriol against President Andrew Jackson, but it says no more about this wedding, which is a pity, for a Chief Justice of the United States—the highest judicial office on earth—was a child of the marriage.

Melville Weston Fuller was born in Augusta, Maine, in 1833. His life divides naturally into three periods: He lived in Maine until he was 23 when he went west to Chicago. He practiced law there from 1856 to 1888 when he was appointed Chief Justice. He served in that position for twenty-two years, a longer term than any Chief Justice except Marshall and Taney.

Fuller's Background Was New England

Like most of our Chief Justices, his background was New England. This fact compels some mention of his ancestry, a peril to a biographer, lest he lose his readers when they strike the "begats".

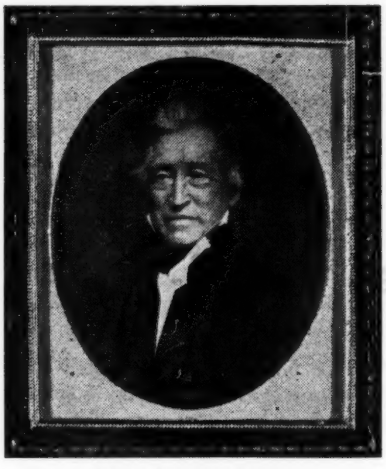
But the story of this wedding can be quickly told. The bride, Catharine Weston, then 20 years old, was given in marriage by her father, Nathan Weston, Jr., then one of the three justices of the Supreme Court of Maine. He was afterwards for many years Chief Justice, and received honorary degrees from Dartmouth, Bowdoin and Waterville (now Colby) Colleges.

Although the first Weston had come to Salem, Massachusetts, in 1644, the judge was no witch-burner. He was a gentle, kindly, considerate man. He told in his later years with obvious horror how a poor woman in Augusta had once been sentenced to sit on the gallows with a rope around her neck. But the sheriff, together with Weston, then a lad, inflicted the punishment in the early hours of the morning in a remote part of the town so that no unkindly eye could see it.

He had once condemned a man named Hager to be hanged, and every now and then he read over his notes of the trial—just to reassure himself. One day he came home white and trembling and when his daughters asked him why, he said: "I was introduced to young Hager and I almost said to him: 'I knew your father.'" But the judge took comfort in the manner of Hager's hanging, which illustrates the grimness of the New England character as well as its spirit of accommodation. A great crowd had gathered for the event and it was raining. The sheriff went to Hager in mid-morning and said: "It isn't customary to have a hanging till noon, but all these people are here to see you hanged and it is raining. Don't you think it would be all right to go ahead with it now?" Hager said yes, and the hanging proceeded.

Like his father before him, Judge Weston was a Democrat. When the boy wrote to his father from Dartmouth College in 1801 that he had decided to become a lawyer, the elder Weston replied: "Lawyers have heretofore occupied a high position in society. They have reaped where they have not sown. They have reaped where others have sown. But all that is changed now that Jefferson is President."

Judge Weston was originally appointed to the Bench by Governor Gerry of Massachusetts after a redistricting which Gilbert Stuart, the famous artist, said made one district



NATHAN WESTON, JR.

(From a daguerreotype in the possession of R. D. Weston, Cambridge, Massachusetts)

that looked like a salamander. "Salamander," snorted a Federalist, "It's a gerrymander," and the name stuck. Gerry went out; but such was the esteem in which Judge Weston was held that he was continued in office through all the changes of administration. He first went on the bench when he was 29 and served continuously for thirty-four years. Not even a caucus call from the Democrats in the legislature to accept the nomination for Governor would tempt him. His opinions, in the first twenty volumes of the Maine reports, are still cited with respect. He was a scholarly man (a Phi Beta Kappa at Dartmouth), of fine appearance and a ready flow of speech.

Judge Weston had one virtue that would have been a vice in other times and places. He was thrifty. His letters to his grandchildren invariably contained a homily on saving. He neither smoked nor drank. "Smoking," he wrote one of his grandsons, "is a filthy, disgusting and offensive practice, is the occasion of not a little expense, and sooner or later leads to drink." He never would allow any of his children or grandchildren to have an overnight guest in his home. But there was some excuse for this attitude—he had strained himself to the breaking point to put his four boys through college on the meager salary of a Supreme Court Judge. When Chase was appointed Chief Justice of the United States, Judge Weston said: "I hear that Chase is a man of independent property and, if that is so, I don't understand how he can bear to sit there and be talked at by a parcel of d—d lawyers."[1]

Judge Weston's mother, the bride's grandmother, who lived in Augusta at the time of the wedding, was the sister of the Rev. Aaron Bancroft of Worcester, the author of the well-known *Life of Washington*. She had a nephew, Dr. George Bancroft, who had graduated with honors at Harvard and taken a Doctor's degree at Göttingen in Germany. Dr. Bancroft was then writing articles for the *North American Review*. He was yet to write a *History of the United States* in ten volumes and become a cabinet member, minister to England and Germany and political boss of Massachusetts.

Judge Weston's wife, the bride's mother, was one of the four beautiful Cony sisters, daughters of the Honorable Daniel Cony. Their father had sent each of the girls down to Boston to spend the winter and make her debut at the great mansion of Governor Bowdoin. Each of them had repaid the effort by a handsome marriage. Paulina had married Judge Weston, Susan had married her cousin, General Samuel Cony (thus preserving the Cony name), Sarah had married the Honorable Reuel Williams, afterwards United States Senator from Maine, and Abigail had married the Reverend John H. Ingraham. A talent for marriage ran in the family, and Paulina's daughter, Catharine, was carrying on the family tradition at this wedding.

Bride's Grandfather Served with Washington

The bride's grandfather, the Honorable Daniel Cony, was an austere old Federalist who added dignity, if that were possible, to the nuptials. As a lieutenant in Washington's Army, he had worn a cocked hat and knee breeches, but in the last few years he had belatedly donned pantaloons. (Ministers had preached sermons against that change!) Daniel Cony had been a practicing physician in Augusta and also Judge of the Court of Common Pleas and Judge of Probate of Kennebec County prior to the separation of Maine from Massachusetts. Each year he celebrated the surrender of General Burgoyne at which he had been present. He had been a presidential elector on Washington's second election. Electors were then supposed to exercise their own discretion in electing the President, but it could not have taken much judgment to vote for Washington. Daniel Cony had also been temporary chairman of the constitutional convention that framed the first constitution for Maine in 1820. Two of his grandsons were to be Governors of Maine, and a great-grandson was to be Chief Justice of the United States.

The bride's little sister, Louise, doubtless watched the ceremony with solemn eyes. She grew up to be a serious girl whom Ralph Waldo Emerson, in a letter to Margaret Fuller, called "mine & your Louise of Augusta." Tradition in the family claims that Aunt Louise was "half crazy,—she was a transcendentalist."

Groom Came from Distinguished Family

The groom, Frederick A. Fuller, then 24, also came from a distinguished family. His first American forebear was Edward Fuller, whose name appears in the Mayflower compact. The groom's father was Col. Henry Weld Fuller, who had graduated from Dartmouth in 1801, where he was a classmate and intimate friend of Daniel Webster.

The Colonel's letters from "Black Dan", who later became the "God-like Daniel", tend to confirm the family tradition that the Colonel was a gay dog. Writing to Fuller of a

1. Nathan Weston to Henry W. Fuller, November 9, 1849, Dorothy Fuller papers; Mrs. Nathan Weston to Melville Fuller, November 9, 1851; Nathan Weston to M. W. Fuller, August 16, 1856; Melville M. Weston to M. W. Fuller, May 1, 1880, Genet papers.

trip to Dartmouth in 1803, Webster said: "Really, Weld, bad as you are, I should have been glad to see you there, merely because it would have been more like old times. On retiring, the possessor of my arm was so preposterous as to say 'Weld is truly very sprightly and amiable!' With all the rhetoric I had, I could not beat her out of this foolish idea, and I believe in my soul she will carry it to the grave with her. Alas, Alas, the perversity of female minds!"

Again, reporting to Fuller on a party at Concord, Webster wrote: "I asked Miss Lucy if she wished to see Mr. Fuller very much. She said that–that–that–the Lord knows what she did say. I could not tell. There was a No, and a Yes, and a blush, and a smile, and a laugh, and so you may make what you can of them."[2]

The Colonel's father and maternal grandfather had graduated from Yale. Colonel Fuller had been county attorney for Kennebec County and was, at the time of the wedding, judge of probate. He was a sweet and amiable man who had made a fortune by the purchase in 1818 of the acreage on which a principal part of Augusta was to be built. He had none of Judge Weston's lack of conviviality. Fuller and Weston had attended Dartmouth together, and were then the leading Democrats of Augusta. Doubtless they had had something to do with arranging the match. Colonel Fuller had built and sold to Judge Weston the mansion house on Pleasant Street at the head of Oak Street in which the wedding was held.

Colonel Fuller's wife, the groom's mother, was Esther Gould. Her sister, Hannah Flagg Gould, was the author of many popular volumes of verse; her brother, Benjamin Apthorp Gould, was the famous principal of the Boston Public Latin School, and the author of the standard annotated school editions of Ovid, Horace and Virgil. She had a nephew, then only 5, also named Benjamin Apthorp Gould, who was to become one of America's great astronomers. The groom's sister Louise was undoubtedly present at the wedding. Two years later she was to marry Samuel E. Smith, the Governor of Maine.

From the Westons, Chief Justice Fuller inherited his sensitivity and conscientiousness, his gentleness and kindliness and his capacity for methodical work and monk-like study; from the Fullers, his passionate and romantic traits, his independence of judgment and his genius for friendship.

Fuller Was Very Proud of New England Ancestry

It is not surprising that the Chief Justice always took a New England pride in his ancestry. Though he had lived for several decades in Illinois (where the culture is ruggedly equalitarian; an interest in genealogy is usually frowned upon as undemocratic and it is a common statement that only unsuccessful people are interested in their ancestors), he was able to speak in his later years of the "continuity" of life in Augusta, –and "without continuity," he said, "men would become like flies in summer."[3]

The date of the wedding, 1830, was the year after the inauguration of Andrew Jackson–probably the sharpest change that ever took place in American history. To the Democratic fundamentalists it is the true American revolution, surpassing in importance the Revolution of 1776. Their opponents retort that hitherto our presidents had been notable men who had rendered outstanding service to their country, and that hereafter (with rare exceptions) they were to be little men who had antagonized no one but had caught the popular fancy. As Henry Adams ruefully intimates, the opportunities for a man of culture with "continuity" in his family to render important public service were far less after Jackson than before. But both the Fullers and the Westons were Jacksonian Democrats in a period when people took their politics seriously. Sometimes there were two celebrations of the Fourth of July in Augusta because the members of neither party would admit that the adherents of the other were sufficiently patriotic to be entitled to celebrate such a day.

But Jacksonian Democrats fared better in the elections in Maine than elsewhere in New England. Frederick Jackson Turner, in his study of the frontier in American history, has pointed out that the American frontier for many years ran along the coast of Maine, and that Maine's culture has always, as a result, had a frontier or western savour. In 1830, Maine was only a seacoast and a forest. Its people, spread along the coast, built and sailed the Yankee clippers at a time when they covered the seas. Augusta, the state capital, though well inland on the map, was the head of the tide on the Kennebec. In 1834, 265 ocean-sailing vessels arrived there, and in the same year a steam packet line started from Augusta to Boston. The railroad did not reach Augusta until 1851. Before

Moffet Studio

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2. Webster to Fuller, December 21, 1802. Dr. B. A. G. Fuller papers printed in part in Private Correspondence of Daniel Webster, Vol. 1, p. 126. First quotation is from later source, p. 140, and letter is dated July 2, 1803.

3. Fuller, Augusta Centennial Oration, June 9, 1897.

that, transportation, except for the river, was by stage. A man could take the stage in Augusta after dinner and be in Boston the next day at night, the third day in New York, the fourth day in Philadelphia, and the fifth day in Washington.

Life Was Raw and Crude, But People Were Cultured

Augusta had a population of about 4000 in 1830, and about twice that in 1850. Even then the population was 97 per cent native born. Augusta had a dam, several saw mills, a quarry, a cottonmill, a state house, an insane asylum, and a United States arsenal, whose morning and evening gun, heard so many times in his youth, was later to arouse poignant feelings in a Chief Justice of the United States when it sounded seventeen times in mid-day. Life was raw and crude, but the people were remarkably cultured,—Augusta had bookstores, circulating libraries, a privately owned high school and lyceum lectures as early as the thirties. But the men consumed great quantities of rum; Fuller liked to tell of his great-grandfather, who could lift a barrel of rum with his hands and drink from the bunghole.

The New England character is a peculiar blend of contradictions. The people of Augusta in 1830 were a sensible, conscientious, law-abiding folk, and yet they were quixotic nonconformists. "Whoso would be a man," said Emerson, "must be a non-conformist." All his life Fuller wore his hair long. They were reserved, reticent, restrained and undemonstrative; yet the writing of poetry was well-nigh universal among them. The Chief Justice wrote a great deal of it in his younger days. They were shrewd, calculating and thrifty individualists, and yet had a profound sense of social responsibility. They held to the Puritan ideal that to justify existence one must serve one's fellow men in some way. They were passionate reformers. But they adhered to what was tried unless a proposed reform convinced their reason. They were against unthinking experiments and had no ear for those resting on an emotional appeal. Years later the Chief Justice was to say in a speech at Bowdoin College: "It was said of Turgot [the French economist] that he was filled with an 'astonished, awful, oppressive sense of the immoral thoughtlessness of men; of the heedless, hazardous way in which they dealt with things of the greatest moment to them; of the immense, incalculable misery which is due to this cause.'"

Future Chief Justice Reared in Age of Transcendentalism

The period from 1830 to 1850 is the time of the flowering of New England, the age of Transcendentalism, the Romantic era in American history, the period of the rise of the common man, the period of manifest destiny. In New England it is a time comparable to the Elizabethan era in England when, at one time, Shakespeare, Marlowe and Ben Jonson were all living in London, then a town of only 100,000. New England had Emerson, Melville, Longfellow, Thoreau, Hawthorne, Whittier, Holmes, and Lowell. (Melville Fuller read all of these except Thoreau and Lowell as they came from the press.) A wave of optimism spread over the land. Three cheerful ideas dominated the thinking of the people: First, that not the few elect (as Calvinism had it) but everybody—at least almost everybody—would be saved for the life hereafter; second, that the possibilities of man's intellectual development were unlimited; and third, that the United States was destined to become the greatest nation on earth.

Few boys in New England in that day escaped being told that, with hard study, they might become President of the United States. Such youthful fantasies were akin to religious and patriotic fantasies, and it was equally sinful not to cherish them. Melville Fuller, half jestingly, once told his cousin, Paulina (who was raised in the same household), that he would some day be Chief Justice of the United States.

After the wedding Frederick and Catharine Fuller settled down in Augusta where the groom had been admitted to the Bar. In 1831, a son, Henry Weld Fuller, was born, and on February 11, 1833, a second son, Melville Weston Fuller. Three months after he was born, his mother filed a suit for divorce against his father in the Supreme Court of Kennebec County. Divorces were rare in 1833. Catharine Fuller alleged that her husband had committed adultery with persons unknown to her on the first day of July, 1830 (less than two months after their marriage), and at divers times between that day and the first day of February, 1833. Frederick Fuller was served with summons in Penobscot County and answered, denying the charge "in the form alleged" and demanding a jury trial. But the court denied a jury trial and decreed a divorce.

Father Had No Part in Fuller's Life

Divorces were then so new that lawyers were not sure whether the guilty party could remarry. A year later Frederick A. Fuller filed a petition in the same court reciting the divorce granted to his wife and praying that a like divorce be given him. This prayer was allowed, and it was decreed that the infant children, Henry Weld Fuller and Melville Weston Fuller, should remain in the custody of their mother, but if she should place them in the custody of Colonel Fuller (their grandfather) he gave bond that he would maintain and educate them to the age of 21 years. Five years later Frederick A. Fuller remarried in Orono, Maine, and had five children before his death in 1849. He practiced law and was once Chairman of the Board of County Commissioners of Penobscot County. He had no part in his son Melville's life except to transmit to him the family characteristics.[4]

Children of divorced parents are

(Continued on page 255)

4. Original court files and decrees in office of clerk of Supreme Court of Kennebec County, Augusta, Maine. The last will of Frederick A. Fuller in office of clerk of Probate Court of Kennebec County, Augusta, Maine, leaves a legacy of $200 to his son "G. Melville Fuller", indicating that Frederick by 1841 (the date of the will) did not even know his son's correct name.

Habeas Corpus and Extraterritoriality:

A Fundamental Question of Constitutional Law

by Philip B. Perlman • Solicitor General of the United States

■ Do American courts have the power to issue writs of *habeas corpus* to determine the legality of the detention of citizens or aliens by American authorities who are beyond the territorial jurisdiction of the courts? The recent war has made this old unsettled question of constitutional law a fundamental issue. Solicitor General Perlman details the legal questions involved in this article taken from a recent address before the Nineteenth Judicial Conference of the Fourth Circuit.

■ A great war—like any gigantic social convulsion—accelerates the growth of legal rules and techniques to deal with the novel problems that emerge out of the conditions of conflict and require immediate solution. The international trial of major war criminals for the commission of offenses against peace and against humanity is a leading example. The circumstances of war also seem to bring to life problems which are not really new, but which have been dormant or undisputed for years, until wartime pressures suddenly cause them to affect multitudes of people in many places.

My topic covers one of this latter class of legal problems—a situation which theoretically has existed throughout our history and previously has even erupted into little noticed actuality, but which the volcanic pressures of World War II have brought to the surface with sufficient force to compel a fresh survey. And that is the relation of the writ of *habeas corpus* issuable by American courts to inquire into the legality of the detention of persons by American officials—civil or military—outside the territorial limits of the United States—the "problem of *habeas corpus* and extraterritoriality", as I have called it. This is, perhaps, a rather narrow issue, but it is one which does go directly and deeply to the core of some of our fundamental conceptions of constitutional law and judicial power.

The courts are suddenly called upon to decide when, if at all, the great writ of *habeas corpus*—the writ described by the English historian, Macaulay, as "the most stringent curb that ever legislation imposed on tyranny"—will issue to enable inquiry into the legality of the detention of aliens, enemy or otherwise, and citizens held in American prisons by American or by international authority outside the territorial boundaries of this country. And we in the Department of Justice can testify that during the past three years this question has been brought insistently to our notice.

The problem has pressed upon us during the recent war and postwar years through a combination of circumstances. In the first place, the period of active hostilities took millions of Americans outside the continental United States, its territories and possessions, and onto foreign soil; and simultaneously brought millions of non-Americans under the control of American troops. The war's aftermath left our troops and civilian military government officials in occupation of large parts of Germany, Austria, Japan and Trieste, and in control of certain friendly areas of the world, such as the bases leased from Great Britain. In the course of these large-scale combat and military government activities abroad, there were bound to be occasions in which American citizens —both servicemen and civilians—and aliens—both enemy and friendly—were taken into custody and detained under circumstances which the prisoner could and would claim as illegal, in the same way that that claim is made frequently within this country. In particular, some scores of German and Japanese nationals have been tried for various types of war crimes and have been sentenced to death, imprisonment, or confiscation of property.

The second ingredient of the problem comes from our basic conception that judicial jurisdiction is territorial, that, so far as *habeas corpus* is concerned, a court can act only upon persons within its grasp. Ordinarily,

of course, there are no American courts—civil or criminal—abroad, and Congress seems to have limited the *habeas corpus* process of the federal district courts to their respective jurisdictions, in the sense that the court's jurisdiction is premised on the presence of the prisoner within the territorial limits of the district. In the *habeas corpus* statute (now 28 U. S. C. 2241) Congress has provided that "Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge *within their respective jurisdictions.*" This language does not seem, on its face, to permit a court to go beyond its territorial limits in issuing the writ, and if this is so Congress has made no provision for the release of persons illegally held abroad.

The third factor stems from the widely-shared belief that American citizens everywhere must be able to claim the full protection of the Constitution at any time. There is also the related belief—probably held by fewer people—that aliens subject to American control, even enemy aliens in their own country, can rely on constitutional immunities, such as those contained in the Fifth Amendment. This is but another phase of the debate which began after the Spanish-American War and has continued to simmer ever since, and is known to all of us as the question as to whether, and to what extent, the Constitution follows the flag.

A fourth ingredient making up the problem is the special place of the writ of *habeas corpus* in our system of life. As Secretary of State Acheson once said, in this country we hold the writ to be basic to liberty. The Constitution has given it a unique status, and in the last two decades or so the courts have increasingly stressed its high office as the protector of freedom.

The last factor is the fact that many of our current activities overseas are not exclusively American. They are carried on conjointly with other nations, pursuant to international agreements or under the auspices of international agencies. Frequently, American officers and officials act directly on behalf of a concert of powers or in implementation of some international understanding. This supranational character of much of our foreign activity adds a factor which is often decisive.

Problem Has Existed Since Revolution

I have stated that the problem of *habeas corpus* and extraterritoriality has existed in theory since the founding of the Republic. And that is true, because our courts' jurisdiction has always been limited territorially and there have always been occasions in which an American official could hold someone outside the then frontiers of the country. At least that was so in fiction. We all recall Edward Hale's famous story of the *Man Without a Country* who was confined in American warships throughout the seven seas for half a century. But it was only after the turn of the twentieth century, when the United States became a true world power and acquired overseas possessions, that the power of courts to issue the writ of *habeas corpus* to release persons held abroad by American officers was first put to an actual test.

There were antecedents, of course, as there generally are in the law. A traditional function of *habeas corpus* is to determine the custody of minor children as between contending parents or guardians, and these cases have at times involved the problem of extraterritoriality. The most famous involved the authority of courts of Michigan to order the release of a child removed to Canada and held there. That case was *Re Jackson,* 15 Mich. 417, decided by a distinguished but equally divided court in 1867—even in 1867 they had distinguished but equally divided courts—in which Justice Cooley argued strongly that the writ could issue to release a person held anywhere in the world, so long as the jailer was in the control of the court. Justice Campbell insisted just as strongly that the prisoner himself had to be within the court's territorial jurisdiction.

But these nineteenth century cases dealt with the custody of children, or of slaves, and did not present any claim of constitutional right. The history of the attempted use of *habeas corpus* against an allegedly illegal *government* detention outside the United States seems to begin in 1903. The case was *McGowan* v. *Moody* (22 App. D. C. 148), in the Court of Appeals of the District of Columbia. A marine was held by naval officials in the island of Guam, acquired from Spain in 1898 and governed by the Navy, and which had no court with *habeas corpus* jurisdiction. A petition for the writ was brought in the District of Columbia against the Secretary of the Navy under whose control the marine's immediate jailer was said to be. The Court of Appeals affirmed the denial of the writ, holding, as one of the two alternative grounds of its decision, that the District of Columbia courts were without jurisdiction since the prisoner was detained beyond their territorial limits. And this must be the result, the court said, even though it might be that the marine was restrained of his liberty in contravention of the Constitution and laws, and could obtain a remedy in no other court.

No Cases Arose Between 1903 and 1941

From the time of that decision in 1903 until World War II there does not seem to have been any attempt—at least no reported attempt—to use the writ of *habeas corpus* against detention of a prisoner by an American government official outside the borders of the country. Perhaps one reason for this absence of litigation is that *McGowan* v. *Moody* was thought to establish the law for the District of Columbia, and it was in that jurisdiction that such suits would naturally be brought, since it is the seat of the Government and the official residence of the higher officials who could order the release of a person held abroad. The more significant reason was that, except for the short

period of World War I and for even shorter periods on this continent, the forces of the United States were not stationed, in any substantial number, in areas in which ordinary American courts were not available. The territories and possessions had *habeas corpus* courts, and the limited time American troops were overseas during World War I, as well as the restricted nature of the postwar occupation of Germany, did not permit the problem to develop.

With World War II, the circumstances were much different. Not only were very large numbers of Americans stationed in various parts of Europe and Asia during the fighting period, but substantial forces have remained in Japan, Germany and Austria as occupation troops. American civilians have also become part of the military government system in the occupied areas, and have become subject to courts martial or to special military government tribunals established for the trial of civilians in the occupation zones. Millions of enemy aliens, and some friendly aliens, have come under the supervision and governance of the American military government and are punishable by the military government courts. War criminals have been ferreted out, tried, convicted and punished.

Yamashita Case Denied Writ

From these circumstances have arisen the numerous cases which have come before the Supreme Court and the courts of the District of Columbia in the past three years. The first of these was General Yamashita's case early in 1946, 327 U. S. 1. He was charged, tried, and convicted in the Philippine Islands by a military commission for violations of the law of war while acting as the Commanding General of the Fourteenth Army Group of the Japanese Army in the Philippines. After his conviction, the American Army officers who had been appointed to represent him, sought a writ of *habeas corpus* in the Supreme Court of the Philippine Islands. The grounds alleged were mainly that the military commission which had tried him was illegally constituted, that the trial procedure violated the requisites of due process, and that the actions charged against him were not outlawed by the law of war.

On denial of the writ by the highest Philippines court, Yamashita petitioned the Supreme Court of the United States for a writ of *certiorari* and at the same time sought leave to file an original petition for a writ of *habeas corpus*. For the purposes of this discussion of *habeas corpus* and extraterritoriality, the Supreme Court's decision on the merits that the General's trial was valid and his detention lawful has little direct bearing. For one thing, the Philippine Islands were American territory and not foreign soil at that time, and its courts were open and available; for another, the Supreme Court admittedly had jurisdiction of the case on the petition for *certiorari* to the Supreme Court of the Philippines, and it was therefore unnecessary to consider separately the original application for *habeas corpus* filed in the Supreme Court. The same is true of the case of the other Japanese war criminal, General Homma (327 U. S. 759), which closely followed *In re Yamashita*.

But the *Yamashita* opinion does have an important tangential relevance for it reiterated the holding in the Nazi saboteurs' case (*Ex parte Quirin*, 312 U. S. 1, 24-25) that combatant enemy aliens who are accused as war criminals do have, in certain circumstances, rights under the Constitution and laws of the United States. Chief Justice Stone's views on the rights of enemy aliens in these two cases do not indicate that the Court has gone any further than to hold such aliens entitled to the protection of our Constitution and laws where Congress has indicated by its legislation that it intends to grant rights of this nature to them. The Court has not held that enemy war criminals may make a claim of constitutional violation in the absence of some federal statute which can be construed as endowing them with these privileges as an act of grace. Alien enemies on foreign soil do not possess them *as of right*. And to the extent that persons detained abroad —German or Japanese war criminals, for example—have no substantive rights under American law, it is immaterial whether they have the formal jurisdictional right to bring *habeas corpus* in our courts. The application for the writ would automatically have to be denied on its face for failure to state a recognizable claim of right. But, of course, the Supreme Court has not yet passed definitely upon the full measure of the constitutional rights of alien enemy war criminals held overseas.

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Solicitor General of the United States

Early in the court term succeeding that in which Yamashita's case was decided, the Supreme Court had occasion to pass upon seven original petitions for *habeas corpus* which were filed, not by enemy aliens, but by American soldiers and civilians imprisoned in foreign territory occupied by American troops. *Ex parte Betz*, 329 U. S. 672 (October 14, 1946). The motions for leave to file were all denied for want of original jurisdiction, with Justice Murphy alone voting to hear argument on the matter of jurisdiction. Article III,

Section 2, Clause 2 of the Constitution strictly limits the Supreme Court's original jurisdiction to "cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be a party," and it has long been settled that an original writ of *habeas corpus* in aid of the Court's appellate jurisdiction can issue only to review an exercise of *judicial* power. The Court cannot pass directly in review upon the action of a military commission or other nonjudicial authority. There was, therefore, no basis for the issuance of *habeas corpus* by the Supreme Court in these cases in which no judicial action was involved. However, Justices Black and Rutledge took occasion to note that the various petitions "should be denied without prejudice to their being filed in the appropriate District Court." This advice apparently was not taken in these seven cases during the time the petitioners remained abroad. One reason undoubtedly was the fact that the Armed Forces have adopted the practice of returning American military prisoners serving sentences longer than six months to prisons or disciplinary barracks within the continental United States, thus opening the way to normal *habeas corpus* processes. For instance, Kathleen Nash Durant, whose original application for *habeas corpus* was one of the seven denied by the Supreme Court in October, 1946, was brought back to serve her sentence at Alderson Reformatory, and then filed a petition which was passed upon in due course by the District Court for the Southern District of West Virginia, and then by the Court of Appeals of this Circuit. *Hironimus* v. *Durant*, 168 F. (2d) 288 (May 4, 1948), *certiorari denied*, 335 U. S. 818.

Supreme Court Divides on Question

One year after the denial by the Supreme Court of its jurisdiction to consider these American petitions for *habeas corpus* (disposed of in *Ex parte Betz*), the Court had occasion to determine the first of the many applications on behalf of German or Japanese war criminals convicted by war crimes tribunals overseas. In October, 1947, the motion of General Milch—a German war criminal—for leave to file an original petition for a writ was denied by an equally divided Court. *Milch* v. *United States*, 332 U. S. 789. The Chief Justice, and Justices Reed, Frankfurter and Burton did not expressly indicate why they thought leave to file should be denied, but presumably it was their view that, as in the case of the Americans detained abroad, the Supreme Court was without jurisdiction. Justice Jackson did not participate because of his connection with the great trial at Nuremberg, the trial in which our Chief Judge Parker played such an important part. Justices Black, Douglas, Murphy and Rutledge announced the view that "the petition should be set for hearing on the question of the jurisdiction of this Court." For Justices Black, Douglas, and Rutledge this seemed to be somewhat of a change in opinion from their position of the previous year—on the denial of the *habeas corpus* petitions filed by the seven American citizens—that relief must be sought, if at all, in the appropriate District Court.

Since October, 1947, when Milch's petition was denied, some two hundren German war criminals—tried by various types of war crimes tribunals—have followed him in petitioning the Supreme Court directly for writs of *habeas corpus*. The four to four division of the Court on the Milch petition has become standard and has marked the pattern for the disposition of almost all of the subsequent cases. Four of the Justices have insisted that the Court has no jurisdiction of such original petitions, and four desire that argument be had to settle that question for all time, and what remedy, if any, the petitioner has. The Court has never undertaken to determine a German war criminal's petition on the merits. (Many of these *per curiam* decisions are collected in Justice Jackson's statement on the Japanese war criminal cases, 335 U. S. 877; there have also been several later decisions).

It seems curious that for a year and a half a constant stream of petitions has come to the Supreme Court from German war criminals even though that Court's deadlocked position is well-known. Very few petitioners took the road to a district court, though those that did have been a bit more successful thus far. Perhaps one may suggest that the place of the Supreme Court as the highest court in our land and the prime symbol of justice has overshadowed, in the minds of the German lawyers who have filed most of these petitions, the intricacies of the Court's limited jurisdiction. It also seems to me to be an interesting note that all these applications for relief in our courts by German war criminals apparently stem from the example set by the American lawyers who, while in Army uniforms, conducted the spirited defense of General Yamashita, and the even earlier example of the then Colonel Kenneth Royall of North Carolina and his Army associates in defending the Nazi saboteurs in 1942. Somehow, I take that to be a tribute to American justice and the American Bar.

Supreme Court Has Not Yet Decided

The Supreme Court has rejected original petitions for *habeas corpus* filed in that Court by American nationals and by alien enemies held abroad, but it has not yet given the answer to the question whether such Americans or enemy war criminals can have recourse to any lower federal court in the United States. However, the Court's opinion in *Ahrens* v. *Clark*, 335 U. S. 188, a domestic *habeas corpus* case decided over a year ago, bears upon that problem and reveals at least some of the considerations which must be weighed in the balance. In the *Ahrens* case, a group of German alien enemies who had been ordered deported by the Attorney General under the Alien Enemy Act of 1798 as inimical to this country's interests, and were being held at Ellis Island,

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Disability Benefits Programs Here and Abroad: Their History and Scope

by **Mary Donlon** • Chairman of the New York State Workmen's Compensation Board

■ Is socialism a necessary concomitant of social service legislation? Do income-maintenance programs, unemployment insurance and disability benefits provided by the government necessarily interfere with the free enterprise system? Miss Donlon's answer is no, and she sets forth her reasons in this article taken from an address delivered at the Annual Meeting of the Association last September.

■ Disability benefits are part and parcel of the comprehensive system of mutual aid and self-help comprised within the term "social services" about which there is so much discussion in our own country and, in fact, all over the world today. Whether you are all for the welfare state, or for a state of welfare for all—and there is a world of difference between them, each with its advocates—there is no domestic issue of our times that is more discussed, more fraught with controversy, or that more seriously requires right decisions. The discussions and controversies on this question are generating more heat than light, perhaps because so frequently the sound social objectives that are desirable and mutually desired are confused with methods of achieving those objectives that are fundamentally unsound.

For at least a century, since the beginning of the Industrial Revolution, and with an accelerating tempo during the twentieth century or "mass production" phase of the Industrial Revolution, the social, economic and political forces that have alternately shaped and threatened the free institutions of the western democracies have compelled governments increasingly to initiate social service programs and to expand them. This is no cause for alarm. There is a basic minimum of security and living standards below which we, who live in the middle decades of the twentieth century and have some measure of responsibility for government policies, cannot permit any one to fall.

Problem Is How Far *Can* Government Go

The problem that plagues free institutions today is not, then, the problem of how far government *should* go in providing or requiring the provision of basic social services. Let us agree that there is at least the duty to provide a floor of social services.

The problem is, rather, how far government *can* go in such programs without threatening the free institutions that make such programs possible. This is important. It is the private enterprise system that, thus far at least, has succeeded in raising living standards higher for more people than the living standards under any other economic system in the world and in any other period of recorded history.

This we should keep in mind. When we know the whole story of the recent elections in New Zealand and Australia, private enterprise may be the key to the political riddle down under. In both countries the social services had come to be identified popularly with a political philosophy that called for socialized insurance and, finally, the socialization of all private enterprise. It was accepted by government for fifteen years in New Zealand and for at least four years in Australia that out-and-out socialism was the price a free people had to pay for social services. As between a conservative party that stood both for abrogation of the social services and the strengthening of private enterprise, and the socialists who fathered the social services and also were for socializing enterprise, the New Zealanders and the Australians made their choice. Of these two political party offerings, they chose socialism.

It seems now that they really did not want socialism. Another choice has now been offered to them, evidently more to their liking. The recent elections were not won by conservatives. They were won by a liberal coalition pledged to maintain the social services, but to do so within the framework of a strong private enterprise system. So it seems that down under the people want social services and they also want free enterprise.

That, too, is what they seem to want in most of Europe when the choice is offered them.

Is it possible to have the basic social services and free enterprise? I believe it is, but the methods used must stimulate free enterprise, not stifle it.

It will be useful, first, to look back briefly, to observe from where we have come to where we are.

Social Service Was Hit or Miss Before Industrial Revolution

Social services before the Industrial Revolution were almost wholly provided through voluntary agencies and on a hit-or-miss basis. There was at least as much "miss" as "hit". There were in almost every locality one or two ladies bountiful. There were the religious whose lives were dedicated to serving the needs of the poor. There were also some institutions maintained through private benefactions. The purpose of all of them was to provide relief from a state of destitution that was accepted as inevitable.

Prevention of the social dislocations that cause destitution was an idea not yet born. Even such indispensable social services as our modern public health programs were then entirely unknown. Group plans to provide income maintenance as a partial safeguard against the destitution that makes relief necessary were almost unknown. Almost, but not quite.

Guilds Were First To Provide Income Maintenance Programs

The earliest groups to concern themselves with what we now call income-maintenance programs were the guilds. Predecessors of the modern labor unions, the guilds early saw that the concentration of workers in urban centers, increasingly dependent on continued cash earnings to meet the minimum needs of mere existence, made necessary some kind of pooled provision for income maintenance. Especially in the countries of central and western Europe, many of the largest and most prosperous guilds began to accumulate substantial reserves, through member assessments, in order to serve the needs of their members during periods of income failure due to disability or unemployment. Their programs foreshadowed as long ago as the early eighteenth century both disability benefits and unemployment insurance. It was to be a hundred and fifty years before government moved in over there; still longer before social insurance became a fact through legislative action over here.

History sometimes selects unlikely agents to effect social progress. It was Bismarck, father of modern Germany, the statesman who a century ago welded the separate German states and petty principalities into a nation, who turned private social services for workers into a public program. It inevitably would have happened, sooner or later, and it would finally have happened as a conscious social program whenever the educational opportunities of workers expanded and they had gained universal political franchise. With Bismarck, however, social insurance was a political device, an incident to his consolidation of power in the German state. It happened this way.

The German guilds were an obvious threat to Bismarck's power. They were well-knit and strong organizations. They had ample funds in their treasuries. They were independent. Their long-established practice of paying benefits to their members during illness or unemployment gave them a cherished and popular organization purpose. Bismarck wanted their funds and wanted to make the guilds less powerful, but even more he wanted to make industrial employment attractive to rural Germans so that they would come into the cities to man Germany's factories. His dream was to turn a handful of agricultural states into a mighty industrial nation. Bismarck looked on the guild social services and found them useful and attractive.

He accomplished all that he sought by two simple devices. He made the guild social insurances available to workers outside the guilds so that the guilds no longer offered the only social insurance available. Then, as bait to induce the guilds to what amounted to political suicide, Bismarck offered to cover their members into the seemingly more attractive government-provided social services and to reduce the assessments on workers by providing that some of the support of the new social insurance program should come through assessments on employers, all in return for the transfer of the guild reserves to the new German state. It was clever. It worked, and there was the first modern, state-provided social insurance.

Common Law Struggled with Idea of Social Insurance

Meanwhile, across the English Channel and here in the growing union of American states, the common law a hundred years ago was struggling —not too happily—with the idea of social responsibility at least for those disabilities that employees incurred in industry. At common law obligation had always been related to fault. Without fault, there was no common law liability.

The right of any disabled employee was then founded in tort, a wrong done by his employer, not in a recognized social responsibility. Fault was difficult to prove in most cases. Even when an employer's fault was proved, the injured worker or the family of a fatally-injured worker usually could not recover damages from the employer at common law. Employers had several defenses, including contributory negligence, assumption of risk, and the so-called "fellow servant doctrine". Under employers' liability acts, which were enacted to ameliorate some of the hardships of workers under the common law, employers usually could in effect say to their employees: "Heads we win, tails you lose." There was nothing in this situation conducive to good employer-employee relations. There was not yet acceptance of social responsibility, even for industrially incurred disabilities.

It became increasingly apparent that social responsibility for what

was now recognized as a social problem must be substituted for the liability of an employer for an individual wrong done to an employee, and in an even broader field than that of industrial accident disabilities alone. But we in this country took one cautious step at a time.

Workmen's Compensation Was First Social Insurance

Workmen's compensation was the first of the significant social insurance programs in America. It followed by many years the inadequate workmen's compensation program in England. In fact, the initial workmen's compensation enactment in New York State almost exactly coincided with the first legislation in England to provide insurance for workers against the wage loss risks of nonoccupational disabilities, the field into which we are now moving well over thirty-five years later.

England felt the need in her competitive industrial economy of providing some measure of income-maintenance for workers during periods of temporary disability not connected with work accidents or that did not ensue from occupational disease. Here we then felt the social need only of providing for income-maintenance in cases of occupational disabilities. It took us a long time even to go that far in all our states.

Workmen's compensation is now on the statute books in all forty-eight states. Certainly it is not always adequate, either in scope of coverage, the range of benefits or plan of administration.

In seven states, insurance of workmen's compensation is a government monopoly. In the other forty-one states, private insurance is used, either with a competing state fund to take the unwanted risks, or with an assigned risk pool. Usually self-insurance is permitted, sometimes even in those states where insured workmen's compensation risks may be written only by a government monopoly.

During the economic dislocations a decade ago, we embarked on a national program of old-age and survivors' insurance, and also on a federal-state program of unemployment insurance. These are income-maintenance programs for the aged and for those who are well but lack work through no fault of their own.

To the extent that either old age and survivors' insurance or unemployment compensation is insurance in the accepted sense, it is insurance by government monopoly. To the extent that it is not really insurance, it is government provision of benefits out of tax-supported funds without a means test. Whether or not they are insurable risks, both are important social services.

As to nonoccupational disability benefits, the New York State Federation of Labor in 1918 first asked for legislation in that field of social insurance. The New York State constitution has for years specifically authorized such legislation. But New York did not lead off.

The three states first to enact disability benefits legislation were three of the very few states that exact pay roll taxes from employees for support of unemployment insurance. Under federal legislation such employee contributions are available for payment of disability benefits.

New York State does not require employees to contribute to unemployment insurance and therefore had no such available reserve for initial financing of disability benefits. New York State, when it legislated this new type of social insurance, therefore had to find an entirely different approach.

Rhode Island Provides Nonoccupational Disability Benefits

Just after Pearl Harbor the State of Rhode Island legislated with respect to this, the fourth of the significant income-maintenance social services for workers, namely, insurance to pay nonoccupational disability benefits. This is essentially group accident and health insurance, a risk that demonstrably is insurable. Rhode Island chose to pass over private insurance experience in this field, setting up a state monopoly to provide these benefits at a level tax rate.

The drift toward government monopoly in the social insurances was checked a little by the "contracting out" provision in the 1946 California sickness disability law. While state monopoly remained the rule, the right to "contract out" of state insurance into private insurance was conceded in California.

New Jersey, in 1948, followed the California trend, but like California continued to recognize a state monopoly as the basic method of providing nonoccupational accident and health insurance. However, New Jersey improved the opportunities of "contracting out".

In 1949, New York set a new pattern of social insurance provision within the framework of the private enterprise system. Provision of nonoccupational accident and health coverage has been mandated through state legislation for those who work for the employers of four or more employees, and both private insurance and approved self-insurance are permissible methods of providing

Bradford Bachrach

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these benefits. There is a competing state insurance fund which writes insurance policies as the companies do. There is in New York no state fund for disability benefits maintained by pay roll taxes, as there is under the laws of Rhode Island, California and New Jersey.

Unwanted Risks Must Be Provided For

In any social insurance that is not served by government monopoly, some device is necessary to provide insurance for the unwanted risks. Sometimes it is an assigned risk pool. Because of our long experience in New York State with a competitive state fund for occupational disability benefits, that is, workmen's compensation, the same device was continued for nonoccupational disability benefits.

The State of Washington enacted this year a law that followed in main outline the provisions of the California law. The effective date of the Washington law has been suspended, pending the outcome of a popular referendum in 1950.

Under the laws of Rhode Island, California, New Jersey and Washington, administration of disability benefits is linked to the administration of unemployment compensation. Under the New York State law administration of nonoccupational disability benefits is entrusted to the Workmen's Compensation Board, an agency with thirty-five years of experience in administration of occupational disability benefits, that is, workmen's compensation.

The question where disability benefits administration should best be placed in any state poses two significant problems with far-reaching implications. First, is it desirable to link the administration of a program that is wholly state supported to the administration of a program that depends for its support on budgetary controls of the Federal Government? Second, is social insurance to provide disability benefits a function of employment or of unemployment?

Statistics reveal that the great majority of all sickness disability claims are filed by those who are employed when they become ill. Under the New York law, the employer-employee relationship is strengthened because it is the joint obligation of employers and employees to provide benefits during employment and the first four weeks of unemployment. They deal with one another in an employer-employee relation in administering the benefit claims of all those who become disabled during employment or during the first four weeks of unemployment. Only in cases of disability incurred subsequent to the first four weeks of unemployment does the state step in under the New York law, to administer and pay disability claims. Under the laws of Rhode Island, California, New Jersey and Washington, the identical state agency that pays claims for unemployment compensation also administers the nonoccupational sickness benefits plan.

Four Social Hazards to Income-Maintenance

There are, then, four important social hazards to income-maintenance for workers. All are now met by legislation that is effective in Rhode Island, California, New Jersey and New York. These hazards are termination of earnings due to old age, interruption of earnings due to involuntary unemployment, interruption or permanent loss of earnings due to occupational disability, and interruption of earnings due to temporary nonoccupational disability.

The need to provide some form of cash income when the family wage earner is disabled as the result of an accident or sickness not connected with his job has long been a serious gap in our social insurances. Those who live a week-to-week existence, with no income other than the pay check, are never free of anxiety—almost a nightmare—about what to do when the breadwinner becomes disabled while living expenses continue, medical care becomes imperative, and there is no income in sight. Wage loss resulting from injury or illness of a nonoccupational origin is a significant cause of the high cost of public assistance, since lack of insurance protection forces many workers to turn to public relief authorities when they are disabled. Some system must be worked out and embodied in legislation that will insure wage earners against total loss of income when they are unable to work for an extended, though temporary, period because of illness or accident. That means cash indemnity against the hazard of total wage loss.

Can such a program be insured? Or must it be financed on a level tax basis? How much of our social services should be related to need; how much available as of right, regardless of need?

New York State accepts as an obligation of government, payable out of tax revenues, the provision of care for the mentally ill and the tuberculous. There are social hazards to well persons resulting from nonsegregation of those suffering from these afflictions. This necessary protection to society dictates the provision of such care at public expense.

Other sick persons receive hospital and medical care at public expense on a needs basis. To provide such care for all at government expense, regardless of need, would place a very heavy burden on public revenues derived from taxes, overload costs and decelerate production, and also would, of course, threaten seriously the high quality of our medical care. But in both of these areas—hospital care and medical care—the distribution of costs through insurance is highly desirable. Such insurance should be extended and encouraged, so that every one who desires to buy this type of insurance can be fitted to a policy reasonably tailored to his requirements.

The risks of mass unemployment are so unpredictable as to be noninsurable by ordinary and accepted standards. Unemployment compensation is now a government-accepted responsibility and payments are made, without regard to need, out of taxes levied against pay rolls. The initial concept of unemployment compensation was that it should provide a basic floor of security. There are

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Frederick H. Stinchfield:

1881-1950

▪ Frederick H. Stinchfield, President of the American Bar Association 1936-1937, died suddenly on January 15, 1950, in La Jolla, California, where he was spending the winter on vacation from Minneapolis. He was the first President of the Association under the reorganization that had resulted from the efforts of the Executive Committee and those intimately connected with the Association, particularly of himself and Judge William L. Ransom, his immediate predecessor in office. At the annual meeting in Boston in 1936, where Mr. Stinchfield was elected, upon his presentation to the Bar as its president-elect for the year to come, he heralded the reorganization of the Association, and pledged his unreserved support to the principles set forth in the platform.

He stressed this new status of the Association in the first part of his administration and in his speaking appearances before the various bar associations of the country, until suddenly President Roosevelt, without warning, announced his proposed "court-packing" plan. Immediately this far greater issue took Mr. Stinchfield's entire time and energy. The American Bar, and indeed the entire American nation, may be thankful for his fighting heart and combative spirit, particularly when aroused by the unrighteousness of this attack upon the fundamentals of the American form of government. In the first few days of this momentous contest, he could speak only for himself, but when the Board of Governors of the Association had unanimously supported his expressed position, he went into the contest armed with the support of an aroused Bar.

It is of interest that the members of the Judicial Committee of the Senate, of which Senator Burton K. Wheeler of Montana was chairman, were cognizant of the extraordinary coöperation and help on the part of Mr. Stinchfield in their opposition to this "court-packing" attempt. There hang today on the walls of Mr. Stinchfield's office two historic documents involving this matter. One is a memorandum in Senator

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The General Welfare Clause:

Does It Authorize a Welfare State?

by **Karl B. Lutz** • of the Michigan Bar (Detroit)

■ As old as the Constitution itself, the argument over the meaning of the words "general Welfare" in Article I, Section 8 of the Constitution, is now as intense as in the days of Hamilton and Jefferson, after a remark in a radio address of President Truman. Mr. Lutz examines the history of the phrase and the disputation about it between advocates of a strong national government and those who favor states' rights.

■ Many citizens of the United States today fear that our National Government is moving rapidly toward the "welfare state" preached by German philosophers. This fear is especially prevalent among lawyers and other students of the United States Constitution.

These students place great confidence in the wisdom of the historical compromise by which the National Government was given only certain delegated or inherent powers deemed necessary for national existence, all other powers being reserved to the states or to the people. They believe that our invention of this federal form of government was a major advance in political science, because it reconciled the need for a central government, with the need for the greatest possible amount of local self-government. They point out that this system has been copied by other countries, and has worked so well that Dean Roscoe Pound has concluded, "No country of continental domain has ever been ruled otherwise than as an autocracy or as a federal government."[1]

Another group holds the view that our federal system is antiquated. They believe that only a strong central government can survive in the world of today. But they sense that it is not politically expedient to advocate express change of the federal system, so they counsel the use of oblique means of attaining their objective. They have accelerated the creeping expansion of the central government by stretching the "commerce clause" beyond recognition, and they are proposing to do the same to the "general welfare" clause.

In a recent radio address President Truman criticized the critics and said "they are just about 160 years behind the times because the preamble to the United States Constitution states specifically that the Government was established 'to promote the general welfare'." This view implies that the National Government is empowered to do anything it considers to be good for the individual citizen. This view would remove all limitations on the Central Government, and would soon reduce the states to empty shells.

It is therefore important to reexamine the "general welfare" clause carefully to see whether it actually grants the broad powers claimed for it.

It is true the Preamble states that one purpose of the Constitution is to "promote the general welfare". But this statement is not a delegation of power. The "general welfare clause" that delegates power is in Section 8 of Article I, which enumerates the powers of Congress. Clause 1 of this section, in defining the taxing power of Congress says, "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States."

Meaning of "General Welfare" Is Large Question

The interpretation to be placed on the phrase "general Welfare of the United States" poses a large question. Story, writing in 1833 about this clause said, "It has been in the past time, it is at the present time, and it will probably in all future time, continue to be the debatable ground of the constitution. . . . Here the advocates of state rights and the friends of the Union will meet in hostile array. And here those who have lost power will maintain long and arduous struggles to regain the public

1. Address before The Economic Club of Detroit, February 10, 1947.

confidence, and those who have secured power will dispute every position which may be assumed for attack, either of their policy or their principles."[2]

In 1892 the United States Supreme Court said, "It would be difficult to suggest a question of larger importance, or one the decision of which would be more far-reaching."[3] Today it is even more evident that the General Welfare Clause is an important battleground in the fight for the preservation of our federal system. The broad interpretation of the welfare clause contended for by some would seriously alter the balance of, if not destroy, our federal system. It is therefore worth while to examine this clause in some detail.

Meaning of "General Welfare" in Articles of Confederation

In construing language of the United States Constitution reference is seldom made to the Articles of Confederation, because of certain basic differences in the two forms of government. Yet, where language of the Constitution was obviously carried over from the Articles, considerable information may be gained from a study of its meaning in the Articles.

The phrase "general welfare" occurs twice in the Articles, the phrase "general interests" occurs once, and the word "welfare" occurs once. Under the Articles, Congress had no powers other than those definitely delegated to it, and certainly could not have advanced the "general welfare" indirectly by acting directly on the individual citizens within the states. The context shows that in each case the language quoted was referring to the welfare of the confederation taken as an entire unit in relation to its external affairs.

More specifically, Article VIII of the Articles commences with this language:

> All charges of war, and all other expenses that shall be incurred for the common defense or general welfare . . . shall be defrayed out of a common treasury [supplied by requisition on the states].

Comparing this clause with the Common Defense and General Welfare Clause of the Constitution, Story points out that the "objects or purposes" to which the money is to be applied are the same, the only difference being the method of raising the money; under the Articles by requisition, under the Constitution by taxes.[4]

Reports of the proceedings in the Constitutional Convention lead to the conclusion that when the phrases "general welfare" or "general interests" were used in debate, the context pointed to the external interests of the Union as a whole, contrasted with the internal interests of the individual states. It is no wonder therefore that when the phrase "general welfare" was added as a limitation on the taxing power of Congress, there was no debate as to the meaning of the phrase.

In fact, Madison, in explaining why this power was not more specifically limited, said, "the omission is accounted for by an inattention to the phraseology, occasioned, doubtless, by identity with the harmless character attached to it in the instrument from which it was borrowed . . . That the terms in question were not suspected in the convention which formed the constitution of any such meaning as has been constructively applied to them, may be pronounced with entire confidence."[5] The facts, as they are now known, seem to fully support Madison's statement.

The Language of Phrase Is Construed

The first two objects for which Congress can lay taxes are:

1. The debts of a certain unit (the United States taken as a whole).

2. The common defense of a certain unit (the United States taken as a whole).

Why then, is it not logical to say that the third object is the general welfare of the United States taken as a unit, meaning its external affairs? Such a construction seems to be more plausible and consistent with the history of the Constitution and the federal system than other constructions that have been advocated.

Due to the fact that the phrase "general welfare", if not limited by history or context, is capable of very broad meanings, a wide difference of opinion soon arose as to its proper construction in the Welfare Clause. Those who placed emphasis on state rights and local self-government argued for a restricted meaning. Those who favored a strong central government argued for a broad interpretation.

Madison and Jefferson took the view that "general welfare" was a mere heading for the enumerated powers that follow. This view, which would make the phrase a surplusage, has been generally rejected.

Hamilton, with his fervent desire for a strong central government, took the view that it authorized taxes for any purpose which was not purely local.

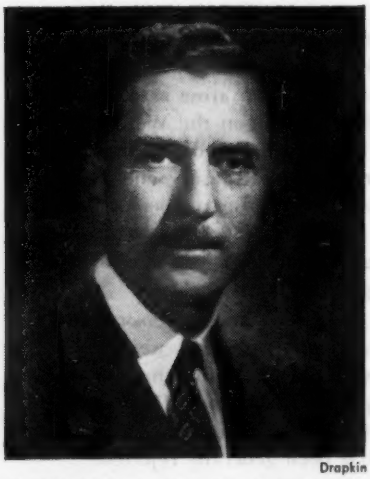
Marshall expressed the opinion that the tax power of Congress is broad, but that "Congress is not empowered to tax for those purposes which are within the exclusive province of the states".[6]

Story discussed the subject at great length, stating in full all views that had previously been expressed, and adopting the Hamiltonian broad interpretation.

Hamilton, Marshall and Story naturally drew all the power possible from the general welfare clause, as they were seeking nourishment to build the infant National Government into a central power strong enough to hold together the husky and sometimes perverse state governments.

Early in our history there arose a practical question as to whether Congress has power to finance internal improvements such as roads and canals. Jefferson recommended a program of such improvements, but believed that a constitutional amendment was required, "because the objects now recommended are not among those enumerated in the Con-

2. Story, *Commentaries on the Constitution* 639.
3. *Field v. Clark*, 143 U. S. 649.
4. 1 Story, *Commentaries on the Constitution* 644.
5. 1 Story, *Commentaries on the Constitution* 660.
6. *Gibbons v. Ogden*, 22 U. S. 1.



Drapkin

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stitution, and to which it permits the public moneys to be applied".[7] Madison and Monroe took the same view during their terms in the presidential office.

Calhoun took the opposite view. He said that popular demand for internal improvements furnished "better evidence of the true interpretation of the Constitution than the most refined and subtle arguments."

The resulting impasse between Congress and the President produced a compromise by which Congress gave grants-in-aid to the states for these improvements.

Subsequent events are summed up by the United States Supreme Court in this language:

> As an examination of the acts of Congress will disclose, a large number of statutes appropriating or involving the expenditure of moneys for non-federal purposes have been enacted and carried into effect.[8]

The opinion goes on to point out that such expenditures have not been challenged because no remedy was open for testing their constitutionality in the courts. A private citizen has no standing in court because his financial interest in federal tax money is said to be too small.

Recent proposals have been made for spending federal tax money for aid to housing, to education and to other strictly internal objects. As in most expenditures of federal funds, the aims of these proposals can be made to appear as compelling national objectives, but they seem to properly belong in the category of "non-federal purposes".

In recent years Congress has passed laws which go beyond merely spending tax money for purposes alleged to be within the Welfare Clause. It has coupled taxation with social regulation of individual citizens. It has set up a multiplicity of national corporations which have tremendously expanded the power of the National Government.

One of these laws, the Agricultural Adjustment Act of 1933, came before the Supreme Court in *United States* v. *Butler*.[9] This was the first time the General Welfare Clause received full consideration by the Court. After paying some attention to the early conflict of views, the Court held the act invalid because it was not merely an appropriation in aid of agriculture. "It invades the reserved rights of the states. It is a statutory plan to regulate and control agricultural production, a matter beyond the powers delegated to the federal government."

A year later the Social Security Act came before an altered Supreme Court in *Helvering* v. *Davis*[10], and was upheld as a valid use of the power given Congress to tax for the general welfare. The Court adopted the full Hamiltonian view, and said that Congress is the sole judge of what constitutes the general welfare.

The position taken by the Court in *Helvering* v. *Davis* amounts to saying that anything that improves the lot of some of the citizens is a valid exercise of the General Welfare Clause, as long as it operates over the entire country. The wide opportunity thus opened for national control and regulation of the individual citizens and for growth of a strong, all-powerful central government must disturb every believer in the American federal system. It can lead us rapidly down the path to autocracy, to which Roscoe Pound has pointed a warning finger. It can be viewed calmly only by those who believe in the dictatorship of the majority, a form of statism.

What can be done to redress the unfortunate situation that has developed under the General Welfare Clause? Obviously it is too late to turn the calendar back to 1800 and start all over again. But we must retreat from the extreme Hamiltonian position if we are to preserve our federal system.

The interpretation suggested herein, namely that the General Welfare Clause relates only to the external affairs of the National Government, offers a middle ground. It avoids the Madisonian extreme of making the clause meaningless, and it gives the National Government a useful power. It would authorize such national action as the purchase and annexation of additional territory, the leasing of military bases in foreign territory, and coöperation with international organizations. It cannot be adopted now as a rule of decision because of vested interests, but it can be used as a warning sign at the crossroads.

Exponents of social control will doubtless object that this interpretation leaves the National Government with insufficient power to cope with modern conditions. The obvious answer is that if this is true, they should seek to obtain suitable amendments to the Constitution. Such is the American way. The practice of maintaining old forms of government while evading their true intent has led to unfortunate results in other countries.

Returning to our main question, we can confidently state that the "general welfare clause" does not authorize a welfare state. It is hoped that those who believe in our American federal system will quickly react against the argument that would use this clause as an additional wedge to open the door for the entry of "statism".

7. Kelly and Harbison, *The American Constitution* (Norton and Company, 1948) 257.

8. *Massachusetts* v. *Mellon*, 262 U. S. 447, 487.

9. 297 U. S. 1.

10. 301 U. S. 619.

National Health Insurance:

A Reply

by Oscar R. Ewing • Federal Security Administrator

■ In the September, 1949, issue of the *Journal* (35 A.B.A.J. 735), William Logan Martin of the Alabama Bar wrote in opposition to the proposed National Health Insurance Act in an article entitled "New York and National Health Insurance: Foundations of a Welfare State?". Mr. Ewing, who has been one of the principal advocates of a national health insurance program, answers Mr. Martin in this issue. This carefully-written statement of Mr. Ewing's views on this important subject will be welcomed by all members of the profession.

■ The September issue of the AMERICAN BAR ASSOCIATION JOURNAL carries an article[1] by William Logan Martin in which he states that "Congress lacks constitutional authority to enact S. 1679", a bill that would establish a national system of compulsory health insurance. If this statement were true—if the issue were even seriously arguable—it would be a matter of grave concern to the Federal Security Agency, which has long espoused just such a system. Since the statement echoes an earlier dictum of the American Bar Association,[2] it deserves critical analysis.

Mr. Martin's attack ranges far and wide, from the National Labor Relations Act to the proposed international Covenant on Human Rights. One gets the impression that he dislikes much modern legislation. I propose to deal with only such of his contentions as are of official concern to the Agency that I head. I ought in fairness to recognize his comforting assurance that "the remedy still lies in peaceful action"—without that assurance, the reader might have gathered a wrong impression from his reference to the patriots of '76—but if the "peaceful action" he plans is action through the courts, he has little chance of reaching what seem to be his goals. Specifically, there is little chance that the courts will strike down national health insurance if it is enacted by Congress.

Validity of Social Security in Doubt in 1935

If Mr. Martin had been writing in 1935 instead of 1949, his argument would command serious attention. When the Social Security Act was passed, many competent lawyers, in as well as out of government, questioned the validity both of national old-age insurance and of the federal-state system of unemployment compensation. But those doubts were laid at rest by a group of decisions handed down by the Supreme Court on May 24, 1937;[3] decisions which, as we shall see, leave little room for argument about the validity of national health insurance. A lawyer writing today in disregard of those decisions is living in a bygone age. Mr. Martin's statement that I have quoted at the opening of this paper would be more forthright if it were amended to read, "Congress lacks constitutional authority to enact S. 1679, the Supreme Court to the contrary notwithstanding."

The Social Security Act adopted

1. "New York and National Health Insurance: Foundations of a Welfare State?", 35 *A.B.A.J.* 735. It is not clear whether Mr. Martin is aware of the fact that the New York law, which he discusses and compares with the National Health Insurance bill (S. 1679, 81st Congress), deals only with cash compensation for periods of temporary disability, and has nothing directly to do with the provision of or payment for health services.

2. 69 *A.B.A. Rep.* 493, at 504; 30 *A.B.A.J.* 275. A contrary view has been expressed by the Attorney General of the United States. See Hearings on S. 1606, 79th Congress, 1st Sess., Part 4, pages 2043, 2048.

3. *Carmichael* v. *Southern Coal & Coke Co.*, 301 U. S. 495, sustaining the Alabama Unemployment Compensation Act; *Steward Machine Co.* v. *Davis*, 301 U. S. 548, sustaining the federal unemployment tax; *Helvering* v. *Davis*, 301 U. S. 619, sustaining the federal old-age insurance system; *Chamberlin* v. *Andrews*, 271 N. Y. 1, affirmed by equally divided Court, 299 U. S. 515, rehearing denied, 301 U. S. 714, sustaining the New York Unemployment Insurance Law.

When these cases were decided the Court had still the membership it had had since 1932, the same membership which had invalidated much New Deal legislation. Mr. Justice Cardozo wrote the Court's opinions in *Steward Machine Co.* v. *Davis* and *Helvering* v. *Davis*, Mr. Justice Stone in the *Carmichael* case. It is worthy of note that Justices Sutherland and Van Devanter joined with the majority in *Helvering* v. *Davis*, and that in the other cases they dissented only in part or on limited grounds. On most of the issues, including all the issues involved in old-age insurance, the Social Security legislation received at least seven affirmative votes.

two quite different methods of bringing social insurance into being. Old-age insurance was created by the direct method of authorizing the payment of benefits from an account[4] in the federal treasury and imposing federal pay roll taxes to finance these benefits. Unemployment compensation, on the other hand, was dealt with by a federal tax, coupled with credit provisions, so framed as to offer strong inducement to state legislatures to enact state unemployment compensation laws. All bills providing for compulsory national health insurance, including S. 1679, have followed the federal pattern of old-age insurance and not the federal-state pattern of unemployment compensation.[5] One would think, therefore, that in considering the validity of S. 1679 a writer would turn his attention to the issues that were involved in old-age insurance and which were resolved in *Helvering* v. *Davis*. Mr. Martin, however, does not so much as mention *Helvering* v. *Davis*. Instead, he undertakes to reargue the tax-credit issue in unemployment compensation.[6] Whether or not the reader is supposed to think that this issue has something to do with health insurance is not clear. It has not.

Because of the structural similarity of the proposed national compulsory health insurance to the old-age insurance system,[7] *Helvering* v. *Davis* is an all but conclusive authority in support of the power of Congress to enact health insurance. I shall therefore discuss briefly the issues involved in that case.

Simplicity of Old-Age Insurance Was Its Greatest Obstacle

The greatest obstacle that the constitutional argument in support of old-age insurance had to overcome was its simplicity. If the collection provisions of the law were a valid exercise of the taxing power (the argument ran), and if the benefit provisions were a valid exercise of the spending power, the two in combination were equally valid.[8] And the Supreme Court so held.[9] Yet even since the decision many lawyers have found a peculiar difficulty in accepting so simple an analysis as a realistic disposition of the question.

Before considering why this simple analysis sufficed, a little should be said about the constitutionality of each of the two pieces of the law if each stood alone.

The taxing provisions need not detain us long. Arguments were made that a tax on employment was not within the concept of an excise when the Constitution was framed, that employment was not a legitimate subject of taxation, that the tax violated the requirement of uniformity, and that exclusions from coverage rendered it arbitrary and capricious. These arguments, which had been considered and rejected in the *Steward Machine Company* and *Carmichael* cases, were disposed of summarily in *Helvering* v. *Davis*. After more than a decade of actual collection of pay roll taxes the arguments seem unlikely to be revived if Congress should impose further taxes of this kind.[10]

The decisions on the spending power of Congress, on the other hand, are what give the Social Security Cases their importance in the history of constitutional interpretation. Apart from war, the great operative powers of Congress are the power to regulate commerce and the power to raise and spend money. The commerce power has been defined and redefined by the Supreme Court throughout our history, but despite the Court's many decisions on taxation, the very existence of the power to tax and spend for purposes apart from the other enumerated powers of Congress had not been authoritatively affirmed until 1936.[11] And in the very act of affirming this power, the Court had so hemmed it in as seemingly to narrow sharply the interpretation that congressional practice had long given to the General Welfare Clause.

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4. Mr. Martin appears to share a common misconception that this account, later reconstituted as a trust fund, involves a wrong (though lawful) use of funds. While there still are differing opinions about the wisest method of financing old-age insurance, the charge to which Mr. Martin refers has been completely and repeatedly refuted by competent scholars. As early as 1938, and again in 1948, distinguished Advisory Councils reported unanimously that the charge was without foundation. This same view has been confirmed by the life insurance companies in *Social Security*, a statement by the Social Security Committees of American Life Convention, Life Insurance Association of America, National Association of Life Underwriters, 1945.

5. S. 1679 includes no taxing provisions, which in any event could not originate in the Senate. Const., Art. I, Sec. 7. Both the structure of the bill and statements of its sponsors make plain, however, that the benefits are to be financed in the main by pay roll taxes. It would be quite unrealistic to discuss the constitutionality of S. 1679 without assuming the enactment of a companion taxing bill, presumably in the form of amendment of the existing employment tax provisions of the Internal Revenue Code.

6. I use the word "reargue" advisedly. Mr. Martin had been the unsuccessful advocate in the *Steward Machine Co.* case. Among his points on reargument, he states that the Supreme Court held the tax not coercive, "four justices dissenting". Actually, the vote on the issue of coercion was seven to two. Sutherland and Van Devanter, JJ., who dissented in part, expressly agreed with the majority that "the States are not coerced by the federal legislation into adopting unemployment legislation."

On several other points the *Steward Machine Co.* case strongly buttresses the argument in support of the validity of health insurance. But the central issue in that case, concerning the alleged coercive effect of the tax-credit mechanism, has no relevance at all to S. 1679.

7. S. 1679 differs from old-age insurance in that the states, upon meeting specified conditions, would be permitted to assume the administration of health insurance benefits within their respective borders, and to receive allotments of funds from the Federal Government for this purpose. These provisions do not alter the fact that the proposal is one for collection of funds under the federal taxing power and disbursement of funds under the federal power of expenditure. The making of expenditures through states which agree to certain conditions set forth in the bill would seem to raise no constitutional issue, in view of the long history of Federal grants-in-aid containing similar conditions. See *Massachusetts* v. *Mellon*, 262 U. S. 447; *Oklahoma* v. *United States Civil Service Comm.*, 330 U. S. 127.

8. Shortly before the decision of the Social Security Cases, the Court said of another statute which involved both taxing and spending, that "neither is made invalid by being bound to the other in the same act of legislation." *Cincinnati Soap Co.* v. *United States*, 301 U. S. 308.

9. Mr. Martin states: "The federal social security system was erected under the taxing power buttressed by the lack of the right of any citizen to challenge the legality of the spending scheme." This statement is reasonably accurate with respect to unemployment compensation; federal grants for administration of state laws were held to be "not at issue". Again, however, Mr. Martin has neglected old-age insurance, which furnishes the constitutional pattern for national health insurance. In *Helvering* v. *Davis*, the Court passed squarely upon the validity of the spending, and left undecided the Government's alternative argument, based on *Massachusetts* v. *Mellon*, *supra*, that a taxpayer had no standing to contest the validity of the expenditures.

10. This is not to say, of course, that novel questions of classification might not be presented by a new pay roll tax, if such questions are open under the Fifth Amendment.

11. *United States* v. *Butler*, 297 U. S. 1, holding invalid the Agricultural Adjustment Act, 1933.

The doubts engendered by *United States* v. *Butler* in 1936 were swept away by the Social Security Cases in 1937. Speaking of the federal expenditures for the relief of distress during the depression, the Court said in the *Steward Machine Company* case:

> The problem had become national in area and dimensions. There was need of help from the nation if the people were not to starve. It is too late today for the argument to be heard with tolerance that in a crisis so extreme the use of the moneys of the nation to relieve the unemployed and their dependents is a use for any purpose narrower than the promotion of the general welfare.

And in *Helvering* v. *Davis*, the Court added:

> Yet difficulties are left when the power is conceded. The line must still be drawn between one welfare and another, between particular and general. Where this shall be placed cannot be known through a formula in advance of the event. There is a middle ground or certainly a penumbra in which discretion is at large. The discretion, however, is not confided to the courts. The discretion belongs to Congress, unless the choice is clearly wrong, a display of arbitrary power, not an exercise of judgment. This is now familiar law. "When such a contention comes here we naturally require a showing that by no reasonable possibility can the challenged legislation fall within the wide range of discretion permitted to the Congress." [Citations]. Nor is the concept of the general welfare static. Needs that were narrow or parochial a century ago may be interwoven in our day with the well-being of the nation. What is critical or urgent changes with the times.

We need not pursue further the Court's application of these principles to expenditures for old-age insurance, but I shall presently have a little to say about their application to health insurance. In the meantime, however, I turn to the other attacks that were leveled at old-age insurance.[12]

It was urged that, because the old-age taxes are part of a social insurance system, it follows that they are not true taxes but are in reality something else disguised as taxes. The answer is that it does not follow. Unlike taxes levied for the purpose of inducing people to behave in certain ways,[13] these taxes are levied for the sole purpose of raising money—raising it to support particular expenditures, no doubt, but if the particular expenditures are valid, it is immaterial that the tax proceeds may be devoted to a particular purpose rather than to the general support of the Government.[14] So we never reach that quagmire of constitutional law where taxes occasionally turn into penalties. The taxes are true taxes. If they can also be described as insurance contributions, how does that impair their validity as taxes?

It is true that the Constitution does not mention "insurance" among the powers of Congress. Neither does it mention "banking". If the fiscal powers of Congress can be exercised in combination to create a bank, the taxing and spending powers can be exercised in combination to create a system of social insurance. Significantly, the word "insurance" does not appear in the opinion in *Helvering* v. *Davis;* obviously because, the taxes and the spending having both been found valid, there was nothing more to be said.

Perhaps the most serious attack on old-age insurance found expression in the assertion that the system violated the Tenth Amendment. The assertion had gained support from *United States* v. *Butler*, which seemed to apply that Amendment, and the "reserved rights" of the states which the Amendment protects, as though they were an affirmative limitation on powers otherwise granted to Congress. Accordingly, the Court of Appeals for the First Circuit held the old-age insurance system unconstitutional, the first ground of decision being that the expenditures ran afoul of the Tenth Amendment.[15] Care of the aged and the indigent, said that Court, had traditionally been the responsibility of the locality or the state; and tradition had been enshrined by the Tenth Amendment.

The Supreme Court, reversing, stated categorically that," The scheme of benefits . . . is not in contravention of the limitations of the Tenth Amendment." After discussing the scope of the General Welfare Clause and the problem of the aged, the opinion continues:

Oscar R. Ewing, the Federal Security Administrator since 1947, is a native of Indiana and a graduate of Harvard Law School. A member of the New York Bar, he was associated with the law firm of Chief Justice Charles Evans Hughes after service in World War I, and is a former partner of the late Charles Evans Hughes, Jr. He has been a member of the Association since 1925.

> Counsel for respondent has recalled to us the virtues of self-reliance and frugality. There is a possibility, he says, that aid from a paternal government may sap those sturdy virtues and breed a race of weaklings. If Massachusetts so believes and shapes her laws in that conviction, must her breed of sons be changed, he asks, because some other philosophy of government finds favor in the halls of Congress? But the answer is not doubtful. One might ask with equal reason whether the system of protective tariffs is to be

(Continued on page 254)

12. Neither Mr. Martin in his paper nor the bar association resolution of 1944 offers any argument that national health insurance is unconstitutional. Each stops with the simple pronouncement of invalidity. In testifying before the Senate Committee on Education and Labor in 1946, however, Mr. Martin added the information that he based his view "particularly" on the Tenth Amendment. What else he based it on he did not say. See Hearings, *supra*, note 2, part 1, pages 209 *et seq.*

13. See, e.g., *Child Labor Tax Case*, 259 U. S. 20; *United States* v. *Constantine*, 296 U. S. 287. Considerations similar to these were pertinent to the unemployment tax but not to the old-age taxes.

14. *Cincinnati Soap Co.* v. *United States*, *supra*, note 8. If *United States* v. *Butler* be thought to have held the contrary, it must be deemed to have been overruled by the *Cincinnati* case.

15. *Davis* v. *Edison Electric Illuminating Co.*, 89 F. (2d) 393.

The Return of Adam Smith:

Some Thoughts on Collectivism and Democracy

by William G. McLaren • of the Washington Bar (Seattle)

■ In reviewing George S. Montgomery, Jr.'s *The Return of Adam Smith,* Mr. McLaren found that it had much to say that needs to be said vigorously in this day when "liberal" and "socialist" seem to be synonymous to many. Accordingly, instead of a review, Mr. McLaren has used the book as the point of departure for an essay upon the place of Adam Smith, the "Father of Political Economy", in contemporary economic thinking.

■ Under the title, *The Return of Adam Smith,*[1] George S. Montgomery, Jr., has presented an exceedingly readable and convincing analysis of the false assumptions and erroneous conclusions of the "welfare state" school of thinking. Even more arresting is his well-documented portrayal of the methods by which and the extent to which the collectivists are molding the thinking of the youth of America. The book is a valuable and scholarly contribution that should be read by every citizen who is at all interested in the present struggle between those who believe in our private enterprise capitalistic system and those who would convert the United States into a "welfare state" type of government.

Mr. Montgomery is a practicing New York City lawyer and in his preface states he was prompted to write this book by a recent experience in an informal discussion with a small group composed of college students and recent graduates, all coming from families who had achieved prosperity under our capitalistic system in business or professional activities. He was amazed at the unanimity with which these self-assured young people condemned the whole capitalistic system and advocated its early displacement so as to bring about a "miraculous new era of social well-being, effortless equality and security for all".

He found himself treated with polite good-natured condescension, but when he ventured to mention Adam Smith and his *Wealth of Nations,* he was promptly informed that Adam Smith and his doctrines were completely outmoded by reason of the development of a complex industrial society that did not exist in the eighteenth century and could not have been foreseen.

Following this rather humiliating experience, he examined the latest edition of the *Wealth of Nations* (published in 1937) and found it contained an "introduction" written by Professor Max Lerner of Columbia University. The reading of this introduction gave him a "glimmering of light" as he noted the strange similarity between its subtle phrases and the glib assured expressions of his young collegiate friends.

When I finished the introduction I was aware that Mr. Lerner had written not an introduction to Adam Smith, but an invitation to Karl Marx. He provided an epitaph for Adam Smith. It was quite evident that Mr. Lerner intended Adam Smith to have no greater influence on the economic thought of American youth than has *Piers Plowman* on its literary expression.

We shall hear more later concerning Professor Lerner.

It is quite appropriate and in fact felicitous that Mr. Montgomery has dedicated his book,

> To those parents who have watched in bewilderment as their children emerge from American schools and colleges mouthing strange and *alien philosophies.*[2]
>
> And to those of America's youth who have as yet escaped complete enthrallment of the propaganda that is *daily leveled at them from lecture hall and library.*

Adam Smith was considered one of the great thinkers of his time, not only by his contemporaries but by succeeding generations of eminent thinkers and writers. In the year of Smith's death, 1790, Thomas Jefferson wrote,

> In political economy I think Smith's "Wealth of Nations" the best book extant.

His basic concept was the ideal of individual freedom in the realm

1. *The Return of Adam Smith.* By George S. Montgomery, Jr. Caldwell, Idaho: Caxton Press. 1949. $2.50.

2. The italics here and in the other quoted material throughout were supplied by Mr. McLaren.

of economics. In this respect his thinking closely resembled that of a great contemporary, Immanuel Kant, who, in the field of philosophy, had "discovered the significance of the ideal of individual freedom. He realized that it must at all costs be defended as the central supporting column for the entire philosophy in which rational beings recognize their worth."

"It is evident that both Adam Smith and Immanuel Kant based their philosophies . . . on some deep-seated conviction as to the worth and dignity of each individual and his obligation to preserve and enhance his own personality."

Adam Smith Was More than Economic Pioneer

While Adam Smith deserved the title of "Father of Political Economy", his "importance in the history of economics is far greater than that of a mere pioneer. He is an active and persuasive protagonist of a particular economic system".

> A gigantic ideological struggle is now raging with world-wide significance—individualism versus collectivism; man versus the State; capitalism versus socialism. The forces behind these opposing ideals represent the vital, decisive factors of the twentieth century. The result of this war of ideas will determine the future of the world's peoples for centuries to come. What is Smith's position in this controversy?

The collectivists "attempt to write Smith off as obsolescent".

The notion that the doctrines of Adam Smith have become completely obsolete, which has been so assiduously cultivated by the "welfare-state" believers, is refuted, as Mr. Montgomery points out, by the fact that later great British thinkers of the post-Industrial Revolution period were strong supporters of the doctrines of Adam Smith. Among them was Herbert Spencer (1820-1903) who lived "all through the nineteenth century Industrial Revolution" and "was fully aware of the industrial developments of his era". In spite of these developments, Spencer had no "doubt of the ability of the individual to survive without resorting to state aid". Spencer maintained that "it is folly for the state to endeavor to direct the multiplicity of necessary activities and the folly is *enhanced as the complexity increases*".

Since the doctrine of individual freedom in the economic world plays such an important part in Adam Smith's thinking, Mr. Montgomery discusses the validity of the concept of such economic freedom. The only method of challenging its validity which demands any serious consideration is "that freedom whatever its virtue *per se* must be subordinated to some superior idea". This challenge is expressed by the statement "The liberty of the individual must be subordinated to the general welfare". This pronouncement, supposed to be profound and unassailable, is actually "either meaningless or pernicious".

It is pernicious because it involves the assumption of a

> would-be superman concealing his ambitions beneath the banner of humanity. The higher ideal of which he speaks is of his own manufacture and he himself is to impose it upon his fellowmen. He is the great modern enemy of freedom. His guises and methods are innumerable—his objective single. He is the social coercionist.

The eagerness of the coercionist "to manage the affairs of others varies directly with his inability to manage his own".

Children May Accept Dogma of Coercionist

The normal American adult may be beyond the influence of these social coercionists, but the children may be extremely susceptible.

> And it is accordingly the children who have been and continue increasingly to be the objects of the subversive efforts of the planners and plotters. Siege is laid to the adolescent mind. Victims and proselytes are sought in the schools and colleges of America. The task of overthrowing the ideals of liberty and independence of the individual American commences with the seduction of the mind of youth.
>
> The temperate-speaking socialist, who advocates the nationalization of private industry, is, therefore, as great a menace to the American way of life as the most extreme communist.

The chief devices in the strategy of these coercionists are an unsupported premise, a *non sequitur*, an illusion, a mirage, a fallacy, and a series of frightening phantoms. The author then makes a brief analysis of each of the foregoing devices in substance as follows:

1. THE UNSUPPORTED PREMISE, *viz.:*

> As compared with the age of Adam Smith, the complexity of the modern world has enhanced substantially the problems of survival confronting the individual's intelligence and industry.

This premise was, of course, repudiated by such writers as Herbert Spencer and others. It is a premise that "has never been and never can be substantiated".

On the contrary,

> It seems plausible that man, by becoming master of nature's powers and resources, has reduced the total human effort required to survive in the modern world, and through intensive division of labor has rendered the task of each individual simpler and lighter.

2. THE NON SEQUITUR, *viz.:*

> The individual in the complex world being faced with greater demands on his intelligence and industry than in the days of Adam Smith, must resort to the State for aid and guidance.

There are three flaws in this assumption: first, that the individual is incapable of improving his own intelligence; secondly, that if he must look beyond himself for aid, he must necessarily turn to the State; and thirdly, "that the State will possess the intelligence and power to assist the individual. This assumption is unwarranted".

> It is certainly as reasonable to expect the individual to manage his own private affairs successfully as to expect some man or group of men to control and manage the affairs of millions.

It is by these steps that some American people have become persuaded that "in this complex world the individual must subordinate his liberty to the general welfare and resort to the State for aid and guidance".

3. THE ILLUSION, *viz.:*

> The State is a superhuman agency, beneficent by nature, with attributes approximating omniscience and omnipotence.

This most useful weapon has its origin in "centuries of superstition

and tradition". The coercionist endeavors to disguise it by using the terms "the public" or "society" instead of "the state" or "the government". The illusion reduced to realistic terms should be "successful politicians and political bureaucrats are nearer to angels than to men!"

4. THE MIRAGE, *viz.:*

> Granted that the State must, of necessity, be comprised exclusively of human beings, at least the individuals comprising the State will be possessed of exceptional qualities, superior intelligence, and altruistic motives.

Since both reason and historical experience have shown the contrary, the survival of such a belief is baffling.

> But the mirage persists. Once the incompetent or unscrupulous politician achieves office, most citizens unconsciously endow him with all the attributes which he should, in theory, possess.

5. THE FALLACY, *viz.:*

> The individual in a democracy may permit the State to enter the economic field without surrendering any of his important liberties.

This assurance is intended for those hardheaded citizens who might object to sacrificing their freedom for the general welfare. "It is a treacherous promise as most of the coercionists are fully aware".

If uttered by a Communist it would not be accepted. "It is otherwise, however, with the Socialist". He conceals his ambition to control the entire economic life "by pretending to have designs only on a limited economic field". But why, he inquires, should any coercionist refrain from extending such controls over the entire economic field?

> We do not forget that a prominent member of the American royal coercionist family once indiscreetly announced that the object of American "liberals" was to vest complete economic domination in the government.

The fallacy is particularly pernicious because it imperils the principle of individual freedom which is an essential characteristic of free capitalism and under which each individual is free "to bring both his industry and capital into competition with those of any other man or order of men".

> When the State intervenes in economic affairs, this basic principle of the capitalistic system is violated. *Economic power and authority are vested in those whose sole responsibility is political.*
>
> State intervention, in the capitalistic system of industry, takes one or more of three forms: taxation, regulation, or nationalization.

6. THE PHANTOMS, *viz.:*

> The device to prevent any retracing of footsteps consists of several fearsome phantoms calculated to discourage any incipient desire to regain lost freedom. Fear and shame based on ignorance or pride are the desired products of these phantoms. Let us examine some of the most formidable.

Among these phantoms are such labels as "reactionary", "the robber barons", "The Return to 'Laissez Faire' ".

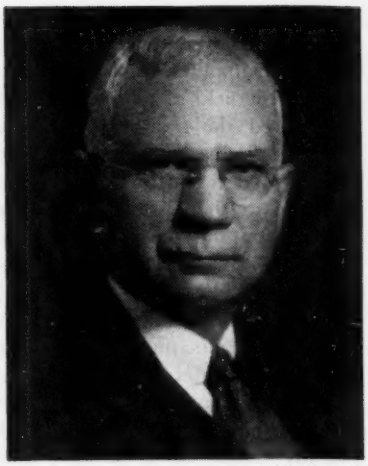
This term he says:

> As originally introduced, presumably by the Marquis d'Argenson, was intended as an emphatic admonition to government administrators to refrain from meddling in industrial affairs. There was no implication that the industrialists were asking for immunity from legal or moral restrictions.

Other phantoms are the cry of "decadent capitalism", and the "mature economy".

The fame of Adam Smith was widespread and "his authority was unquestioned until the advent of the tragic Karl Marx". More recently there has been a well-planned deliberate effort to disparage his reasoning and authority. The next enemy of Adam Smith who appeared on the scene, (Professor Lerner) has already been referred to in the Introduction in connection with the 1937 edition of *The Wealth of Nations*. According to *Who's Who in America*, although not mentioned by Mr. Montgomery, Lerner was born in Minsk, Russia, was Assistant Editor and later Managing Editor of *The Encyclopedia of the Social Sciences*. From 1936 to 1938 he was Editor-in-Chief of *The Nation* and was Editor of the New York *PM* until it suspended publication.

This fifteen-volume *Encyclopedia of the Social Sciences* is "the most perfect illustration available of the extreme to which a determined group of collectivists are resorting in the endeavor to subvert and corrupt the minds of American youth." It would be impossible to discuss all of such pieces of handiwork and so the author limits himself to a very critical analysis of this particular effort "which has succeeded in foisting upon the American public a gigantic work of propaganda in the guise of a scientific and authoritative work of reference." The author does not object to the collectivist philosophy being presented to American youth. "I am merely protesting against false labeling." It is significant that nowhere in the entire fifteen volumes do you find "the views of any proponent of American capitalism, individualism, or free enterprise." In selecting the authors for the various subjects treated in this *Encyclopedia*, it is noted that the preparation of all "key subjects" has been assigned to writers having well-recognized anti-capitalistic views. For example, Har-



Kaiden Kazanjain

William G. McLaren, a member of the Washington Bar since 1902, was born in Iowa, received his college education at Grinnell College, and his legal education at Iowa State University. He was a member of the Board of Governors of the American Bar Association from 1937 to 1940, and is a past president of the Washington State Bar Association.

old J. Laski is the author of the articles on "Liberty", "Democracy", "Bureaucracy", "Freedom of Association", "Social Contract", "Judiciary", "The Rise of Liberalism" and several others. The topic of "Labor" is covered by Emil Lederer of the University of Heidelberg, who therein states that,

> . . . The conception of an organization of the entire economy in the interest of society as a whole has been gaining more and more adherents since the war and especially since the crisis which began in 1929. In particular the development of the Soviet planned economy has spread the idea of such an economic organization and has thereby greatly enhanced the significance of labor in modern society.

Lederer is also the writer on the topic "Economics (Socialist Economics)". The topic of capitalism is allotted not to any American economist but to one Dr. Werner Sombart of the University of Berlin.

This supposedly scientific fifteen volume *Encyclopedia* is "the Trojan Horse in the effort to undermine the thinking of the American youth in his own form of government". "In this manner has the American youth been shamed away from his devotion to the ideals which gave his nation birth and made it the most powerful and prosperous country in history".

In criticizing these foreign sources of most of the important materials in the encyclopedia the author says:

> . . . I do not wish to give the impression that I challenge the healthy maxim that scholarship and science should know no barriers—geographical, national, or racial. On the contrary, it is the editorial staff of the Encyclopaedia which has sinned against the detached, scientific viewpoint by *selecting contributors solely on the basis of ideological prejudices.* That these contributors are of foreign birth or citizenship is not the important point. It is the *invariable alien nature* of their ideology.

Strong evidence that Mr. Montgomery's well-aimed shots have struck a vulnerable target is to be found in an alleged "review" contained in the April 15, 1949, issue of the *Library Journal* which enjoys a circulation among the 12,000 public libraries of the United States. The reviewer by way of implied condemnation says the author is "a New York corporation lawyer". This is evidently intended as a warning to the prospective reader that the book comes from a polluted source and therefore should be avoided.

He also says: "The book would hardly be worth mentioning if it were not dangerous propaganda"! He does not specify who or what is being so endangered so we must assume he means the book is actually dangerous to the spread of collectivism. This is an unintended tribute to the soundness of Mr. Montgomery's analysis.

He also states it "Criticizes 'Encyclopedia of Social Sciences' as prejudiced, dishonest, unscientific, collectivist, and attacks institutions like Columbia and the new School of Social Research". Apparently he considers that *any* criticism of this "Trojan Horse" should be banned and outlawed from all public libraries.

Now the writer of this *Library Journal* "review" is himself a professor in one of the smaller eastern colleges in the department of "economics and government". In view of his obvious animus and his efforts to exclude this book from all of the public libraries it is not difficult to imagine the general nature of his classroom lectures to such of the American youth as come under his care in their supposed study of "economics and government".

Again the reviewer says that Mr. Montgomery "is against everything supposedly foreign" referring to the language in his dedication. But Mr. Montgomery pointed out in his criticism of the *Encyclopedia* that he was not objecting to the aliens as individuals. What he was objecting to in his dedication was "strange and *alien philosophies*".

We are now in a position to resurvey the picture presented by Mr. Montgomery. He states that the *Encyclopedia* "is merely one of many similar pieces of the handiwork of these plotters and planners"—"a part of the tactics followed in lecture hall and conference room" of our educational institutions.

Apparently, we here have substantial proof of Mr. Montgomery's contention. We have Professor Max Lerner, an ardent collectivist, as Editor in Chief of the *Encyclopedia* and as the author of the "Introduction to the recent edition of the 'Wealth of Nations'". We also have this professor of "economics and government" rushing in to destroy and suppress any criticism either of the *Encyclopedia* or of the doctrines which it advocates.

We hear a great deal these days about the desirability of being "open-minded", "tolerant" and "broad-minded" in regard to hearing or reading the expressions of views contrary to our own. We also are urged to respect the so-called doctrine of "academic freedom". Apparently, however, this much desired quality of tolerance is supposed to operate only one way. Any representation of views differing from those of the collectivists is promptly labeled as "dangerous propaganda".

In a final burst of "academic freedom" this reviewer for the *Library Journal* with its 12,000 public library subscribers says:

> Do not buy it. Will probably soon turn up on every librarian's desk as a gift of some financially strong pressure group.

It would seem that this reviewer-professor and the *Encyclopedia* that he so vehemently supports furnish convincing evidence of the statement found in Mr. Montgomery's dedication:

> . . . the propaganda that is daily leveled at them [American youth] from lecture hall and library.

The Genocide Convention:

A Problem for the American Lawyer

by Kenneth S. Carlston • Professor of Law at the University of Illinois

■ Is the Convention on Genocide the best way to punish and prevent acts intended to destroy a minority group? Professor Carlston finds that the answer is no. He points out that there is nothing in the Convention to prevent deliberate destruction of economic and political groups, and that destruction of such groups is the only form of genocide that is presently being committed. He suggests that the process of education may be a shorter and better route to the elimination of genocide than criminal sanctions against its perpetrators.

■ We have seen develop in the past few decades a new and evil religion, that of the supremacy of the totalitarian state. Under its creed, all dissident, all alien groups must be exterminated. Mass murder is made an instrument of national policy. The practices of the Nazis in destroying the Jews and other racial groups, the practices of the Soviet in eliminating political opponents and the kulaks are illustrative of the excesses of this new creed of the supremacy of the State.

The revulsion of the world against Hitler's inhuman treatment of "non-Aryan" groups led the General Assembly of the United Nations in December, 1946, to affirm that genocide, or the mass killing of groups, is a crime which the civilized world condemns. At the same time, the Assembly requested the Economic and Social Council to prepare a draft Convention on the crime of genocide. Two years later, in December of 1948, the General Assembly by resolution approved a draft Convention on the Prevention and Punishment of the Crime of Genocide. The question whether the United States shall ratify that Convention is now before this country.

This is a question in which the lawyers of this country have a particular interest. Hitherto a practicing lawyer need not have concerned himself very much about the terms of any treaties to which the United States may have become a party. They might be very important to him as a citizen, but it is not likely that their provisions would become involved in his practice. Generally treaties govern the relations between states and only occasionally change legal relations between private citizens. Except in rather rare instances, such as the rights of aliens in the descent of property, treaty questions did not come to the attention of the general practioner. For the function of treaties between states is, for the most part, to adjust their differences and to lay down rules and regulations governing their conduct.

Convention on Genocide Is New Type of Treaty

In the Convention on Genocide we have a different type of treaty. The primary purpose of this treaty is not to lay down rules and regulations that shall govern states in the conduct of their relations with one another. This treaty instead defines a new crime called "genocide," and makes it obligatory upon the contracting parties to enact the necessary legislation to ensure that this new crime of genocide is made a punishable crime under their laws.

It is this fact that makes the Convention on Genocide a matter of genuine concern to the practicing lawyer. What is this new crime of genocide? What are some of the important consequences of this Convention to which it is proposed that the United States shall adhere? What action should bar associations take on this important matter?

First of all, then, what is the crime of genocide? Raphael Lemkin, who has probably done more than any other man towards bringing about the international condemnation of this crime, has defined it as involving:

> a wide range of actions, including not only the deprivation of life but also the prevention of life (abortions, sterilizations) and also devices considerably endangering life and health (artificial infections, working to death in special camps, deliberate separation of families for depopulation purposes and so forth). All these actions are subordinated to the criminal intent to destroy or to cripple permanently

> a human group. The acts are directed against groups, as such, and individuals are selected for destruction only because they belong to these groups.[1]

If you and I were asked what we thought the crime of genocide meant, we would probably say the mass destruction by governments of selected human groups.

Now let us see what the proposed Convention would establish as genocide. It involves a sweeping collection of acts some of which are crimes under our domestic law, some of which are merely torts, and some of which may entail slight, if any, illegality.[2]

Does Convention Require Proof of *Mens Rea* in Genocide Cases?

Under our criminal law we usually require both the criminal *act* and *mens rea*, or criminal *intent*, to be proved against the accused. That is, the accused must have committed acts designated under our laws as criminal—he must have killed, robbed or maimed—and he must have intended the accomplishment of the prohibited acts.[3]

In Article II of the Convention on Genocide the criminal intent required is an "intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such." The usefulness of this treaty definition of intent as a means of effectively enabling the punishment of those guilty of the crime of genocide has been strongly criticized. In a minority report of the Committee on International Law of The Association of the Bar of the City of New York, concerning the Genocide Convention, the conclusion is reached that:

> When it is considered how hard it is to prove intent in any case, and how much harder it will be to prove intent in the face of false governmental declarations, spurious proof, distorted records, and self-serving official pietisms, all created by adepts in the art of deception to hide their true intent, it seems plain that such a covenant as we are considering is not calculated to deter or punish effectively the crime against which it is directed.

However, given the existence of the general intent to destroy, a wide variety of acts of varying degrees of criminality and illegality under our laws are made part and parcel of the crime of genocide. These include killing, or causing serious bodily harm to, members of the group. It is equally the crime of genocide to cause serious mental harm to members of the group or deliberately to inflict upon the group conditions of life calculated to bring about its physical destruction in whole or in part. Not only is the crime of genocide thus defined punishable but, under Article III, conspiracy or attempt to commit genocide, complicity in genocide, and direct and public incitement to commit genocide, are to be made punishable.

If a prosecuting official can show that the accused has caused, say, mental harm to a member of some national, racial or religious group and has done so with the intent to destroy such group, "in whole or in part," a conviction seems mandatory. With conspiracy, attempt, complicity, and teaching and advocacy, made criminal, as they are under Article III, the possible widespread effect of the proposed adoption of the Convention is readily apparent. Might not libel and hostile propaganda, local acts of violence, whether mob or individual, unfair employment practices, local segregation practices and ordinances, all become criminal as genocide, whatever may be their status otherwise as crimes under our law? Not only the persons directly involved but also all persons in "conspiracy" or "complicity" with them would share in the criminality. What would be the effect of the prohibition against "direct and public incitement to commit genocide" upon our constitutional guarantees of freedom of speech?

New York City Bar Opposes Convention

One of the strongest criticisms raised against the proposed Convention is that made in the minority report to the Report of the Committee on International Law of The Association of the Bar of the City of New York above referred to. A minority of the members of that committee disapproved the proposed Convention unless it were modified to include a prohibition of genocide against political or economic groups. In taking this position, the minority report stated that:

> The exclusion of political and economic groups from the protection of the covenant vitiates, in our opinion, the entire instrument . . . . The excluded groups are the only ones that are presently in process or imminent danger of extermination. Undoubtedly these groups were denied protection as an appeasement to Soviet Russia and its satellites. Inasmuch as it is concededly a new departure to make genocide criminally cognizable under international law, the advised omission of political and economic groups carries with it, by implication, the judgment of the United Nations that the mass extermination of such groups remains lawful, even though some might question whether it is morally sound.

The minority report caustically commented that the proponents of the Convention would hardly be willing

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1. Lemkin, "Genocide As a Crime under International Law", 41 *Am. J. Int. Law* 145, 147 (1947). The history of the Convention on Genocide in the United Nations is reported in United Nations Document A/760, December 3, 1948. A very careful account of crimes against humanity as considered in connection with the Nuremberg proceedings will be found in Schwelb, "Crimes against Humanity", 23 *Brit. Yearbook of Int. Law* 178 (1946). A critical legal study of the problems appears in Schick, "International Criminal Law—Facts and Illusions", 11 *Mod. L. Rev.* 290 (1948). See also Radin, "International Crimes", 32 *Iowa L. Rev.* 33 (1946).

2. Articles II and III of the Convention define genocide as follows:

Article II

In the present Convention, genocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

(a) Killing members of the group;

(b) Causing serious bodily or mental harm to members of the group;

(c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;

(d) Imposing measures intended to prevent births within the group;

(e) Forcibly transferring children of the group to another group.

Article III

The following acts shall be punishable:

(a) Genocide;

(b) Conspiracy to commit genocide;

(c) Direct and public incitement to commit genocide;

(d) Attempt to commit genocide;

(e) Complicity to genocide.

3. For an account of the historical development of a general *mens rea* and its growing particularization with respect to specific felonies, see Sayre, "*Mens Rea*", 45 *Harv. L. Rev.* 974, 988-1016 (1931).

to have it given the more appropriate title of "Prevention and Punishment of the Crime of Genocide as it was Practiced by the Nazis but Not as it is Now Practiced in the Soviet Bloc."

Genocide has been a crime of *governments*. Individuals have necessarily participated therein, for governments can only act through individuals—officials and others—but the crime is one that has characterized the policy of totalitarian states. It is this fact that makes it so baffling for our international society (in its present primitive stage of development) to meet and control the crime of genocide. As assurance that governments will not again commit the crime of genocide the Convention contains the following provisions:

1. An undertaking by the Contracting Parties that they will prevent and punish the crime of genocide (Article I). It is to be noted that undertakings for the protection of human rights made by the Axis satellite states in the peace treaties following this war have apparently been insufficient to protect their citizens against their Communist governments.

2. An undertaking by the contracting parties to enact the necessary domestic legislation to carry out the Convention and to provide for the punishment of the crime of genocide (Article V). One may question how much real protection this undertaking will afford against the policies of totalitarian states, who can brook no opposition to their supreme power.

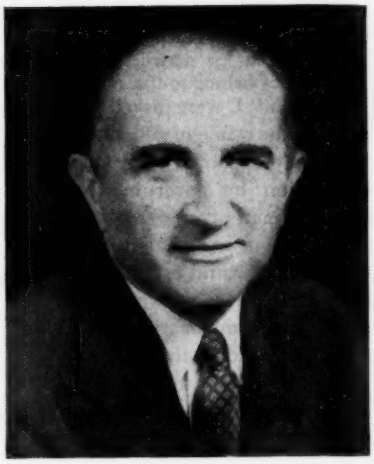
3. Resort to the United Nations for action under its Charter (Article VIII). One need only here to refer to the existence of the veto power in the only body of the United Nations that can take action, namely, the Security Council.

4. Reference to the International Court of Justice of disputes between the contracting parties concerning the "interpretation, application or fulfilment of the present Convention" (Article IX). The moral effect of a judgment of the court finding that a signatory of the Convention was responsible for the crime of genocide would indeed be strong; but the moral condemnation of the world has hitherto not proved an effective discouragement to totalitarian states in the execution of their policies.

5. A declaration that constitutionally responsible rulers and public officials, as well as private individuals, committing the crime of genocide shall be punished (Article IV). The significance of this declaration will lie in its implementation. In the last analysis, the implementation of the Convention is left to the good faith of the signatories—a quality possessed by states in varying degrees.

Adoption of Convention Would Establish New Category of Crime

Proceeding now to an examination of some of the other consequences of the proposed Convention, it should be realized that carrying out the provisions of the Convention will probably result in the creation of a new category of federal crimes. Under the Tenth Amendment to our Constitution all powers not delegated to the Federal Government are reserved to the several states or to the people. Upon ratification of the proposed Convention by our Government, the Convention would, by virtue of Article VI, Section 2 of our Constitution, become part of the supreme law of our land. The Convention provides in Article V that the contracting parties undertake to enact the necessary domestic legislation to give effect to the provisions of the Convention, and to provide penalties for the various offenses stipulated under the Convention. Our Government would thus have the international obligation, as well as the domestic internal power under our Constitution, to enact the necessary legislation to execute these treaty provisions. The test for the legality of this legislation would be whether it was appropriate for carrying out the treaty obligation.[4] While for the present persons accused of genocide are to be tried by our own courts, Article VI of the Convention looks to the possible establishment of an international penal tribunal, under whose jurisdiction the contracting parties may later decide to place



Kenneth S. Carlston has been a professor of law at the University of Illinois since 1946. A graduate of the Yale Law School, he practiced law in New York from 1935 to 1938. He received his bachelor's degree from the University of Washington and an M.A. from the American University. He is the author of numerous articles for legal publications.

themselves, that would have the power to try persons so accused.

In the light of the above discussion, what position should bar associations take with respect to the proposed Convention on Genocide? In the meeting of the House of Delegates of the American Bar Association held in January and February of this year, the House unanimously adopted the following resolution:

> RESOLVED, that the American Bar Association is of the opinion that the Senate of the United States should not consent to the ratification of the [Genocide] Convention unless and until there has been accorded the time and opportunity for adequate public discussion and understanding of the Convention and what is involved in the proposed measures for its implementation.

In taking this step the Chairman of the Committee for Peace and Law Through United Nations, the late Judge Ransom, said:

> I am sure that every member of the Committee and every member of the House of Delegates abhors the acts which it is proposed to class and condemn generically as "genocide". But

4. *Missouri v. Holland*, 252 U. S. 416 (1920).

this does not lead them to an impromptu conclusion that whatever treaty is aimed at preventing and punishing "genocide" should necessarily be ratified as it is submitted, even though such a Convention presents serious constitutional and legal difficulties which may impair or endanger the American system of human rights and fundamental freedoms. Many Americans who are capable of careful and serious thinking on constitutional and legal questions are urging the ratification of the Genocide Convention without reading it or studying at all the effects of some of its provisions—it is enough for them that they and it are opposed to "genocide". Under such circumstances it becomes a high duty of lawyers to discuss open-mindedly such questions as have been raised to see if the desired objectives can be secured without doing great harm to our American system. *To state these questions is not to express any manner of opinion as to the answers to them or to indicate any finality of conclusions.* [Italics supplied.]

Every American who hopes for effective international legislation on the suppression of "genocide" and on other subjects should join with lawyers of the United States and Canada in studying these constitutional and legislative questions and finding answers or solutions for them, including possibly such changes in the forms of conventions, or amendments to the Constitution of the United States, or reservations stipulated in the Senate's consent to ratification, as may be appropriate and sufficiently protective in particular circumstances.

That these questions exist is no excuse for inaction; rather their existance heightens the necessity for work and creative thinking to bring about their solution. Our country can only look to its lawyers for guidance in solving the technical legal questions raised by the Convention. It is believed that, with study and resolution, solutions may be found for the difficulties involved in bringing the Convention into the law of our country. But beyond the essentially technical legal questions, a number of which have been briefly mentioned in the preceding paragraphs of this article, remains the fundamental question whether the Convention is the best way to meet the evil and to prevent the repetition of the practice of genocide. The drafters of the Convention have a responsibility before the peoples of the world. They will look to the Convention for shelter and protection. Those who may be threatened with extinction, and those who find it difficult to stand silently by as mass murder is practiced, are entitled to be informed whether the Convention can be expected to be an effective instrument for its purpose and, if not, why not. For if it be not, the conscience of mankind must not be permitted to rest in the thought that *now* the problem has been effectively met. Few today rest under the delusion that either the League of Nations of yesterday or the United Nations of today represents a final solution to the problem of world peace. And so the struggle for progress, for finding new instruments of control and ways of cooperation still continues. Similarly must we continue to endeavor to eliminate genocide from the world by progressive means.

Certain conclusions seem clear:

1. The crime of genocide, being a calculated crime of governments rather than isolated and sporadic acts of individuals, can only be effectively dealt with if there be established (i) the international penal tribunal contemplated in Article VI of the Convention, and (ii) an effective international police force powerful enough to bring offenders directly before such tribunal for trial.

2. The establishment today or in the near future of such a high degree of international organization is so unlikely that some other method of instrumentation must be chosen if the Convention is to be an actuality.

3. Treaty obligations and promises of domestic legislation are in any case not likely to be carried out by signatories when conflicting national objectives seem more imperative. We have found them to be ineffective in the protection of human rights in the case of the Axis satellite states now in the Russian orbit, and we are unwilling to reply on them exclusively in the case of atomic weapons security.

4. An alternative approach has been developed in the procedure followed by the International Labor Office. It may suggest a possible additional method of dealing with the instant problem. Rather than adding to the tensions between States by making the oppression of labor groups an international crime, the International Labor Office instead has sought through cooperation, research and assistance to raise labor standards and to provide safeguards for labor and better working conditions throughout the world. Perhaps a similar method of creating constant pressure for progress could here be adopted.

5. The possibilities of the suggestion made by Australia of an international court of human relations[5] should continue to be studied. Though obviously an international police force to support the court is today an impracticality, perhaps some agreement could be reached whereby grave instances of genocide, such as have in the past shocked the conscience of the world, could be brought before the court and, through it, before the forum of world opinion.

In the last analysis, there is no easy, single solution to this problem but only the hard and painstaking tasks of strengthening the United Nations and international morality generally. Not until there is substantially universal agreement and acceptance that the practice of genocide is a crime against humanity, not permissible in any circumstances, in the Eastern sphere as well as the West, can we expect a treaty or law making genocide a crime to be respected and enforced.

5. U. N. Doc. E/CN. 4/SR. 16, February 6, 1947.

THE PRESIDENT'S PAGE

HAROLD J. GALLAGHER

■ Since my report in the January issue of the JOURNAL as to my speaking engagements, the following invitations have been accepted as of the date this page is written, up to and including the month of March:

New Rochelle Bar Association, New Rochelle, New York Dec. 12, 1949
Joint Meeting of Greenwich and Stamford Bar Associations, Greenwich, Connecticut Dec. 19, 1949
In attendance at the Annual Bar Dinner of New York County Lawyers Association, New York, N. Y. Dec. 21, 1949
Trade and Industry Law Institute, New York, N. Y. Jan. 11, 1950
Indiana State Bar Association Mid-Winter Meeting, Indianapolis, Indiana Jan. 19, 1950
New York State Bar Association, New York N. Y. Jan. 27, 1950
New Hampshire State Bar Association Mid-Winter Meeting, Manchester, N. H. Feb. 3, 1950
In attendance at the Annual Dinner, Queens County Bar Association, New York, N. Y. Feb. 4, 1950
Philadelphia Bar Association Meeting, Philadelphia, Pa. Feb. 6, 1950
Wisconsin Bar Association Mid-Winter Meeting, Milwaukee, Wisconsin Feb. 18, 1950
Bar Association of St. Louis Commemoration of 75th Anniversary, St. Louis, Mo. Feb. 20, 1950
Joint Meeting of The Kansas City Bar Association and Lawyers Association of Kansas City, Kansas City, Mo. Feb. 21, 1950
Law Club of Chicago, Chicago, Ill. Feb. 24, 1950
Allen County Bar Association, Fort Wayne, Ind. March 2, 1950
Notre Dame University Law School, South Bend, Ind. March 3, 1950
Cleveland Bar Association, Cleveland, Ohio March 8, 1950
University of Pittsburgh Law School, Pittsburgh, Pa. March 9, 1950

I am referring to these engagements to indicate the broad interest which the various state and local bar associations are taking in the American Bar Association, which is most desirable. I am delighted at the opportunity to appear in behalf of the American Bar Association before these associations. It is important, as I have stated before, that we coordinate the activities of the American Bar Association and the state and local associations so that we may concentrate on achieving the objectives of the Bar in an orderly and expeditious manner. We are all lawyers having a common purpose, a common understanding and a common sympathy, and it is most essential that we unite as lawyers in the common effort to improve the administration of justice and to discharge our duties both to the profession and to the public.

Legal Aid

There has been so much written in the JOURNAL over the last couple of years regarding the English legal assistance plan for legal aid that I believe it desirable to emphasize to the profession the vital importance of extending legal aid throughout the country on a volunteer basis. I firmly believe that this is a duty which the Bar must discharge for the benefit of indigent persons who cannot afford to pay for legal services. We must avoid the acceptance of any government aid in this work because if we start accepting the bounty of the government, it will constitute the entering wedge for socialization of the law. Recently Socialist Britain has accepted the philosophy of government grants to extend legal aid to the poor and persons of moderate means but, for reasons of the tremendous cost of the project, has delayed the execution of the plan, which was to have become effective in July of this year. This idea of governmental financial assistance for legal aid, through the Bar, is being advanced for the emulation of the American Bar.

The concept of subsidizing legal aid service by government grant is alien and dangerous to the American tradition of a free and independent Bar. Independence is the foundation stone of the legal profession. If a lawyer is to exercise properly his duty and privilege of serving his clients and the public weal, he must be kept free from bias and influence. With government subsidies come government controls and the loss of freedom.

Lawyers appreciate that their position is one of public trust. They realize that competent legal advice should be available to those who need it. The problem is how best to accomplish this objective. The matter of ways and means is often, as in this case, as important as the substantive end desired.

American lawyers have it within their power to supply the requisite legal service to those who need it without accepting government aid. Legal aid societies throughout the country can provide legal assistance for those who cannot afford to pay legal fees.

It should be noted that the English Bar is confronted with problems quite different from those which prevail in this country. The financial resources of the English people have been sorely depleted by wars and depression. There are no bar associations corresponding to the American Bar Association, representing the entire profession, or the various state, county and local bar associations, through which so much can be accomplished. Neither do we have a

problem parallel to the English as to tremendous costs which may run into thousands of pounds in a single suit. Costs are at the center of their legal framework, and to lose a case may well bankrupt a litigant. The English plan of government subsidized legal aid offers an answer, there, to a serious question without overturning the costs system.

The extension of legal aid to every state must be the concern of all lawyers. In most places outside the great metropolitan areas, the cost should not be at all burdensome if supported by the local bar associations and the communities.

When we are faced with the alternative of more government control, or of local coöperation to extend legal aid to those entitled to it, the choice appears clear. Lawyers have been the traditional exponents of freedom. We must not veer from this course.

Every state bar association may well follow the example of the New Jersey State Bar Association. Under the leadership of Robert B. Bell as President and with the sympathetic counsel and coöperation of Chief Justice Vanderbilt, nearly half of the counties in New Jersey have already started legal assistance plans. I am informed that before summer it is expected that all of the remaining counties will have been covered. By rule of court in New Jersey, the county judge has been given the right to call on the members of the Bar in rotation to serve as counsel for indigent persons in criminal cases with the aid of law students from the local and nearby schools as investigators. Such a plan might also well be followed in other jurisdictions.

The Meeting of State Bar Association Presidents

This meeting which was referred to at some length by me in the "President's Page" for the February issue of the JOURNAL promises to be most successful. A very large attendance is expected. I shall be happy to report in the next issue of the JOURNAL what has been accomplished.

Integration of Effort Among Bar Associations

Perfection of the plans for coördinating the activities of the American Bar Association with the state and local associations will be considerably advanced as a result of the meeting of the bar association presidents in Chicago on February 25. The work of organizing the coördination committee in the several states has been progressing in a highly satisfactory manner. By the time this issue of the JOURNAL reaches your desk, it is hoped that nearly all of the state coördination committees will have been appointed. I sincerely urge all local bar associations to interest themselves in the work of these state coördinating committees to the end that they will be able to set up committees in their own bar associations to take action along the lines of the committee and Section work being carried on by both the American Bar Association and their state associations. As I have said before, the members of the Special Committee on Coördination and of the several state committees on coördination and I myself earnestly urge the support of all lawyers for the plan to "muster our collective power for the common weal."

Notice by the Board of Elections

■ The following jurisdictions will elect a State Delegate for a three-year term beginning at the adjournment of the 1950 Annual Meeting and ending at the adjournment of the 1953 Annual Meeting:

Alabama	Missouri
Alaska	New Mexico
California	North Carolina
Florida	North Dakota
Hawaii	Pennsylvania
Kansas	Tennessee
Kentucky	Vermont
Massachusetts	Virginia
	Wisconsin

An election will be held in the State of New Jersey for State Delegate to fill the vacancy in the term expiring at the adjournment of the 1951 Annual Meeting. The State Delegate elected to fill the vacancy will take office immediately upon the certification of his election.

Nominating petitions for all State Delegates to be elected in 1950 must be filed with the Board of Elections not later than April 20, 1950. Petitions received too late for publication in the April JOURNAL (deadline for receipt March 5) cannot be published prior to distribution of ballots, fixed by the Board of Elections for April 27, 1950.

Forms of nominating petitions may be obtained from the Headquarters of the American Bar Association, 1140 North Dearborn Street, Chicago 10, Illinois. Nominating petitions must be received at the Headquarters of the Association before the close of business at 5:00 P.M. April 20, 1950.

Attention is called to Section 5, Article VI of the Constitution, which provides:

> Not less than one hundred and fifty days before the opening of the annual meeting in each year, twenty-five or more members of the Association in good standing and accredited to a State from which a State Delegate is to be elected in that year, may file with the Board of Elections, constituted as hereinafter provided, a signed petition (which may be in parts), nominating a candidate for the office of State Delegate for and from such State.

Only signatures of members in good standing will be counted. A member who is in default in the payment of dues for six months is not a member in good standing. Each nominating petition must be accompanied by a typewritten list of the names and addresses of the signers in the order in which they appear on the petition.

Special notice is hereby given that no more than twenty-five names of signers to any petition will be published.

Ballots will be mailed to the members in good standing accredited to the states in which elections are to be held within thirty days after the time for filing nominating petitions expires.

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Journal

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EDITORIAL OFFICE

1140 North Dearborn Street.....Chicago 10, Ill.

■ *In the Cause of Uniformity*

In these anxious days when the whole world is on edge—when patience and tolerance and the effort of men to understand each other are at a premium—when the validity of our republican principles is seriously challenged and we are urged to devote more and more of our time and substance to participation in international affairs, in the hope that the extent of what we contribute may serve as a comparable measure of the stability and permanence of peace in the world—when we are faced with the urgent need of making the talent of the organized Bar available in the solution of the soul-vexing problems attendant upon these critical emergencies, we may be excused, perhaps, if our attention becomes distracted from domestic questions in our own profession and the energy of our application to them seems, for the moment, halting and uncertain.

One of the oldest concerns of the American Bar Association is related to the desirability of uniformity of legislation and judicial decisions. Even as the Association took shape at Saratoga in 1878 and adopted its Constitution, this objective received preferred attention; for in Article I of that Constitution the original object of the Association is thus stated:

> Its object shall be to advance the science of jurisprudence, promote the administration of justice *and uniformity of legislation throughout the Union*, uphold the honor of the profession of the law, and encourage cordial intercourse among the members of the American Bar.

Judge George Rossman, the learned Chief Justice of the Supreme Court of Oregon has contributed to this issue of the JOURNAL a most interesting and absorbing article dealing with the practical difficulties encountered in developing and achieving uniformity of legislation and judicial decision. As he says, all too often the legislatures of the various states amend suggested legislation drafted and submitted in the interest of uniformity throughout the Union and thus vitiate its basic purpose; or they accept these proposed acts verbatim and neglect to repeal inconsistent laws which remain in the statute books to plague alike legislator, judge, lawyer and litigant; or, at later sessions, they destroy uniformity already accomplished by later amendments.

Hardly less troublesome, as Judge Rossman demonstrates, are those occasions, all too numerous, when different courts disagree sharply and emphatically and construe the same statute now to mean one thing and again the exact opposite and so upset uniformity already effected in legislation.

The story that the Judge tells throws into sharp relief the years of struggle and the difficulties encountered in the tireless effort carried on for so long so tenaciously by those who would advance the important cause of uniformity.

Against this background of general consideration it is a source of great satisfaction that we can give our readers in this issue not only Judge Rossman's splendid presentation but also another brilliant contribution from the pen of an accomplished craftsman.

William A. Schnader tells of the work of the National Conference of Commissioners on Uniform State Laws. He tells much that has gone before in its growth and development and of the achievements of the Conference over the years. He writes with authority for he has been president of the Conference and is now a member of the Council of the American Law Institute.

These two great organizations by their joint effort have presented to the Bar a draft of a new Commercial Code for suggestions before its final approval. It is probably as important a project as any ever undertaken by the Commissioners and the Institute. They wisely decided not to assemble a patchwork of amended uniform acts nor yet to be satisfied with a restatement repeating the language of old material. Rather, they wrote an entirely new code covering the ground comprehended within the provisions of existing acts as well as new material relating to commercial law.

It is an excellent and workmanlike codification.

This is the sort of work to which the Association must unfailingly devote its best efforts. Always we should be alert for these opportunities to help make the administration of justice more effective in the public interest and facilitate the service of well-trained lawyers and make it more readily available to those who need it. Problems like this, crying for solution, are always before us from day to day and year to year. They must be attended to, and they can be, even as we rally our forces to meet the challenge from time to time of some great question of emergency character, national or international in scope.

■ *Ye Are of More Value Than Many Sparrows*

In our January issue, three men, former Secretary of War Patterson, Mr. McKinnon and Ambassador Jessup, expressed ideas of American foreign policy. These were the ideas of a soldier, a lawyer and a diplomat. The soldier said that he did not share the fear that the people of the Soviet Union would overtake in science and industry a people fending for themselves under a government of their own choosing, and that whatever strengthens the cause of personal freedom in the world gives strength also to the cause of peace. The lawyer said that with a sound program of principles we could really oppose Communism, and named as a cardinal principle the recognition of the spiritual nature of man as the basis of justice of human brotherhood. The diplomat said that we had an actual and a legal interest in the preservation of human rights, and that openly and covertly the dignity and worth of the human person were being assailed.

Of course it is no mere coincidence that each counted the dignity and worth of the human person as a fundamental of his thesis. The rightness of the idea is so self-evident to us all that the idea is in danger of becoming a truism. Yet we must not permit it to be regarded as trite or stale or hackneyed. Our business as lawyers is the preservation of the dignity and worth of the human person. If we professionals fail, there is little hope that success will crown the efforts of amateurs. Thus, on the shoulders of the lawyers of the United States rests the hope of the world. Every instance of unlawful enforcement of the law that we let slip by our guards lands in the headlines as one of those exceptional departures from the general high level of our standards of conduct referred to by Ambassador Jessup but it is fed out to the people behind the iron curtain as an example of the normal working of our system. Our competitors in this race between the forces of darkness and the forces of light know well the technique of the fleeing thief who cries "Stop thief!" We cannot afford to give them foundation for that strategem.

Perhaps it is the dictators' own lack of dignity and worth that leads them to deny the dignity and worth of their subjects and the rest of humanity. Our assumption of dignity and worth for the human race requires that we ourselves show forth to the world that dignity and worth. *Noblesse oblige.* The most important task before each of us is to see that, in no place where we can prevent it, are the rights of the individual, be he friend or enemy, denied. We must fight the Communists under the rules of the game for, if we stoop to their methods, even victorious we become Communists. What shall it profit a country if it gain the whole world and lose its own soul?

Editorial From a Member of Our ADVISORY BOARD

A Judge Answers

In the *American Magazine* for December, 1949, John C. Knox, Chief United States Judge for the Southern District of New York, discussed the question: What makes a good judge? The subject should be interesting not only to lawyers but to all citizens. And when the author is a person of such learning, perspicuity, experience and courage as Judge Knox, the discussion should have especial attention. Judge Knox not only tells, he exemplifies "what makes a good judge". He has been serving as a United States judge since 1918 and, as senior judge, has been charged with the administrative duties of the busiest trial court in the country. The character of his administration is shown in the provision that only persons of good sense and good character should be called for jury duty. It is an honor to be called as a juror in the Southern District of New York and the character of the jurors is reflected in the work of the court.

Judge Knox has not been submerged by his official duties however. He has maintained an active interest in the life and people of his time. A man of broad sympathy and profound understanding, he has also the literary skill to enable others to share his observations and impressions. He has found the time to write articles for magazines and two books, *A Judge Comes of Age* and *Order in the Court,* which prove him a master narrator and artful raconteur. These two books are in the very forefront of popular legal literature.

Judge Knox's outstanding success as judge, administrator, speaker and writer is based on his sterling traits of character. He is a humble man, without guile or affectation. He has always maintained the common touch. His frankness is rugged but kindly. Imbued with true American ideals and high standards of integrity and taste, he has championed them fearlessly and spoken of them in a way that all good people can understand.

The importance to our form of government of an informed, experienced, independent and consecrated judiciary cannot be overestimated.

The *sine qua non* of government, not of men but of law, is a judiciary divorced from financial, political and personal interests and devoted wholeheartedly to justice, the object of the law.

Judge Knox says:

> Nevertheless, I fear the qualities we have been discussing have not always motivated some appointments that have been made to the federal bench. Upon occasions I have thought that some of the appointees were selected because of their economic, social, or—should we say?—political points of view.

The Judge's observation is shared by others. Many good citizens feel that in too many instances the appointing power has been abused in order to indulge a personal whim or favor a friend. The appointing power is, or should be, a sacred public trust. It is not a bounty to be indulged or bestowed for selfish considerations. The Senate should abandon "Senatorial courtesy" and "political patronage" and exert its full constitutional power against such abuse. It should insist on the selection in each instance of the best judicial character available.

From the time of the founding of our Government, the truly great judges have been interpreters of our laws and institutions to their countrymen. Although not listed among their legal duties, the obligation has been assumed of speaking and writing in behalf of a sound and understanding public opinion. We are grateful that Judge Knox, in spite of his heavy burdens and recent illness, has found the time and the strength to give us council and direction at this time of need. In him the great tradition of our jurisprudence is kept alive.

ROBERT N. WILKIN

Cleveland, Ohio

Each month a member of the Journal's Advisory Board is asked to contribute an editorial signed by him. In this way we hope to be able to reflect the many facets of opinion, and the active interests, of lawyers, judges and teachers of law, in all parts of the United States. The views expressed by each contributor are his own, and are not necessarily those of the Advisory Board or the Board of Editors.

It is this "glorious uncertainty" which has enabled us, in accordance with the genius and spirit and by the processes and methods of the common law, in a country of written constitutions, where the general will has been broadly set down in the fundamental law beyond the power of either courts or legislatures to change or transgress it, to find, discover, and within constitutional limits give effect under changing conditions to that General Will. This is and always will be so, because in the hands of judges greatly conscious of their function, the common law is no rigid and dead pronouncement. It is a living, a vital, a growing organism.

—JOSEPH C. HUTCHESON, JR.,

Law as Liberator, pages 137-138. Chicago: Foundation Press, Inc. (1937).

Review of Recent Supreme Court Decisions

ATTORNEY AND CLIENT

Disbarment of Attorney by Patent Office Upheld

■ *Kingsland* v. *Dorsey*, 338 U. S. 318, 94 L. ed. Adv. Ops. 107, 70 S. Ct. 123, 18 U. S. Law Week 4032. (No. 53, decided November 21, 1949.)

In a per curiam opinion in this case, the Supreme Court notes that Dorsey was barred from practice before the Patent Office by the Commissioner of Patents for "gross misconduct". The District Court reviewed the Commissioner's order and affirmed. The Court of Appeals for the District of Columbia reversed on the ground that the charges were inadequate and the hearing before the Commissioner unfair. (35 A.B.A.J. 232) The Court says that Congress entrusted the Commissioner, not the courts, with primary responsibility for protecting the public against malpractice by patent attorneys, and that it is satisfied from the record that the Commissioner's findings were amply supported. The judgment of the Court of Appeals is reversed and that of the District Court affirmed.

Mr. Justice JACKSON wrote a dissenting opinion in which he reviews the facts of the case in some detail, and says that the alleged misconduct lay in Dorsey's submitting a statement to the Patent Office knowing that it was not written by its purported author. He declares that there was no claim that any item in the statement was false or misleading, and says that the disbarment apparently rests upon the records of a case in which the company for which Dorsey was attorney was found guilty of fraud. There is no showing that Dorsey was connected with the fraud there proved, he says, and it was "serious error" to introduce the records at the hearing.

Mr. Justice DOUGLAS took no part in the consideration or decision of the case.

The case was argued by Robert L. Stern for Kingsland, and by William E. Leahy for Dorsey.

BANKS AND BANKING

Escheat to State of Unclaimed Dividends on Claims against National Bank in Liquidation Does Not Necessarily Violate Federal Constitution or Laws

■ *Roth* v. *Delano*, 338 U. S. 226, 94 L. ed. Adv. Ops. 6, 70 S. Ct. 22, 18 U. S. Law Week 4008. (No. 24, decided November 7, 1949.)

A Detroit bank closed in 1933, and in the course or liquidation certain dividends on proved claims were held by the federal liquidators, unclaimed by their owners. The attorney general of Michigan brought suit in the District Court for a declaratory judgment, alleging that the unclaimed dividends escheated to the state under Michigan law. The District Court dismissed the action on the merits, and the Court of Appeals affirmed, holding that the state statute was ineffective as an "unlawful interference with the liquidation of a national bank upon the same principles and authority fully discussed in our previous opinions".

In an opinion written by Mr. Justice JACKSON, the Supreme Court vacated the judgment and remanded for such action as the Court of Appeals might consider appropriate in the light of the opinion. He says that the previous Court of Appeals opinions, cited by that court as determinative, leave it uncertain whether the Michigan statute has been held invalid "for conflict with the Constitution and laws of the United States or inapplicable by intendment of the Michigan legislature." On the merits, he points out that under cited decisions of the Supreme Court nothing in the Constitution, absent interference with a federal statute, prevents the state from escheating these claims. The question whether such interference existed here was not deemed appropriate for decision in view of the uncertainty as to the ground of the opinion below and in view of the further fact that state legislation repealing the escheat statute reserved only pending suits and proceedings so that decision of a declaratory judgment suit might be merely advisory.

Mr. Justice DOUGLAS took no part in the consideration or decision of the case.

The case was argued by Julius H. Amberg and Archie C. Fraser for Roth, and by Stanley M. Silverberg for the appellee.

COMMERCE

Motor Carrier That Operates Solely in District of Columbia But Which Carries Passengers Traveling in Continuous Stream to Virginia and Back Is Subject to Regulation by Interstate Commerce Commission

■ *United States* v. *Capital Transit Company*, 338 U. S. 286, 94 L. ed. Adv. Ops. 89, 70 S. Ct. 115, 18 U. S. Law Week 4019. (Nos. 40 and 41, decided November 14, 1949.)

In an earlier case (325 U. S. 357) involving the same transportation company, the Supreme Court ruled that the Interstate Commerce Commission had the power to regulate certain rates of the company operating bus and street car lines within the District of Columbia and from the District to the Pentagon Building in Virginia, on the theory that the stream of passengers using the lines daily to travel from the District to Virginia was interstate commerce. The instant cases are appeals from a three-judge district court order enjoining a rate order of the Commission, apparently on the theory that a change of conditions since the Supreme Court's determination of the

Reviews in this issue by Rowland L. Young.

earlier case had deprived the Commission of its jurisdiction. At the time of the earlier decision, Transit was operating bus routes both wholly within the District and from the District to Virginia. In 1947, it abandoned its District-to-Virginia route.

In a per curiam opinion, the Court reverses the District Court's holding that all of Transit's operations since 1947 were intrastate in character. "Our previous holding was that all of Transit's intra-District carriage of passengers bound to and from the Virginia establishments was part of interstate movement and therefore subject to Commission regulation throughout. . . . We adhere to that holding," the Court says.

The CHIEF JUSTICE, Mr. Justice REED and Mr. Justice JACKSON joined in a dissenting opinion in which they say that the Motor Carrier Act, 49 Stat. 543, 49 U. S. C. § 301, does not regulate carrier activities that merely affect interstate commerce, and that the stream of commerce theory is therefore inapplicable. They distinguish the previous decision on the ground that, as an operator of interstate routes selling local tickets on its own lines, Transit was required also to sell and accept through tickets that were good for passage on other interstate lines. The Court's decision may have the effect of sweeping into the hands of the Interstate Commerce Commission regulation of all local transportation that carries a large proportion of passengers destined for or arriving from out-of-state points, they say.

Mr. Justice DOUGLAS took no part in the consideration or decision of the cases.

The cases were argued by Philip Elman for the United States and the Interstate Commerce Commission, by Manuel J. Davis, S. Harrison Kahn and Samuel O. Clark, Jr., for the transportation companies, and by Lloyd B. Harrison for the Public Utilities Commission of the District of Columbia.

CORPORATIONS

Payment of Full Amount of Claims Against Insolvent Corporation Purchased at Discount by Close Relatives of Directors Upheld Where Corporation, Though Insolvent, Was Going Concern at Time of Purchase

■ *Manufacturers Trust Company* v. *Becker*, 338 U. S. 304, 94 L. ed. Adv. Ops. 99, 70 S. Ct. 127, 18 U. S. Law Week 4025, (No. 55, decided November 21, 1949.)

In May, 1946, Calton Crescent, Inc., found itself unable to discharge in full its obligations under debenture bonds maturing in 1953 and filed a petition under Chapter XI of the Bankruptcy Act. The plan of arrangement allowed a dividend of 43.61 per cent of the principal amount of the bonds. The Manufacturers Trust Company, as original trustee under the indenture and as creditor for fees and disbursements due it as indenture trustee, objected to claims of three holders of debentures, a friend and two close relatives of the directors of Calton. Their individual holdings totaled $147,300 in principal sum, and would yield a dividend of $64,237.53, but had been purchased at a total cost of $10,195.43. The bonds had been purchased by the relatives of the directors while the corporation was insolvent but still a going concern. Manufacturers contended that the circumstances of the acquisition of these debentures required limitation of the claims of these three creditors to the cost of the debentures to them, plus interest, on the theory that directors are precluded from profiting by the purchase of claims of an insolvent corporation, and that claimants so closely related to directors should not be permitted more. The referee decided to the contrary, and the District Court and Court of Appeals affirmed.

Mr. Justice CLARK wrote the majority opinion of the Supreme Court affirming. He holds that the record does not tend to establish that the opportunity for purchases of the securities of a going concern during insolvency would deprive it of the sound judgment of its officer. Accordingly, he holds that the mere relatives of directors were under no disability as to such purchases. While the nonrelative had not purchased all his bonds prior to the filing of the petition, his relation with the directors was said not to be close enough to make this material.

Mr. Justice DOUGLAS took no part in the consideration or decision of the case.

Mr. Justice BURTON, with whom Mr. Justice BLACK joined, wrote a dissenting opinion. He says that, while corporation directors are not trustees, their obligations to their corporations are fiduciary. Whenever some of its directors invest in its bonds at a substantial discount in the face of a prospective liquidation, an inherent conflict of interests is created, he says, and the solution lies in making them accountable to the corporation for profits from such an investment without proof of any overreaching or breach of trust. In this case, he says, it should be determined whether at the time of the purchase of the debentures in question there was a sufficient prospect of liquidation to create a conflict of interest in the directors, and if such a conflict existed, then it should be determined to what extent, if any, the relatives and friends of the directors are to be identified with them. He would reverse and remand for further proceedings.

The case was argued by Edward K. Hanlon for the company, and by David W. Kahn for Becker.

POST OFFICE

Undue Restriction of Cross Examination at Mail Fraud Hearing Held To Make Fraud Orders Unenforceable

■ *Reilly* v. *Pinkus*, 338 U. S. 269, 94 L. ed. Adv. Ops. 79, 70 S. Ct. 110, 18 U. S. Law Week 4021. (No. 31, decided November 14, 1949.)

The Postmaster General issued a fraud order against Pinkus restricting his use of the mails after a hearing at which it was established that Pinkus was conducting a mail-order business in an antifat treatment known as "Dr. Phillips' Kelp-I-Dine Reducing Plan". The treatment consisted of a recommended daily diet and the use of granulated kelp, a natural seaweed product containing iodine. The Postmaster General found that kelp was valueless as a

weight reducer and that whatever efficacy there was in the treatment lay in the diet recommendations, which were found to be neither uniformly safe nor harmless, and to be especially dangerous for persons with heart and kidney troubles. The District Court enjoined enforcement of the fraud order on the ground that it was unsupported by factual evidence. The evidence of the two doctors who testified for the Government was mere opinion, it held. The Court of Appeals for the Second Circuit affirmed.

Speaking for the Supreme Court, Mr. Justice BLACK affirmed. Although the Court think that the advertisements of the treatment were misrepresentations that, "if made with the intent to deceive, fall squarely within the type which . . . justify findings of fraud", the Court feel that the fraud order should not be enforced because the use of certain statements in medical books was denied on cross examination at the hearing. The statements tended to contradict the Government's medical experts, he says, and "it certainly is illogical, if not actually unfair, to permit witnesses to give expert opinions based on book knowledge, and then deprive the party challenging such evidence of all opportunity to interrogate them about divergent opinions expressed in other reputable books". Proof of fraudulent purposes is essential here, he notes, and "one against whom serious charges of fraud are made must be given a reasonable opportunity to cross-examine witnesses on the vital issue of his purpose to deceive." A fraud order, which bars an offender from use of the mails, can wholly destroy a business, he declares, and the judgment of the Court of Appeals is affirmed without prejudice to a reopening of the proceedings to permit additional hearings should the Postmaster General choose to do so.

Mr. Justice DOUGLAS took no part in the consideration or decision of the case.

The case was argued by Robert L. Stern for Reilly, and by Bernard C. Segal for Pinkus.

TAXATION

Wisconsin Emergency Inheritance Tax, Computed as Percentage of State's Share of Federal Estate Tax Credit and Added Thereto, Held Invalid Where Decedent Owned Real and Tangible Personal Property Outside the State

■ *Treichler* v. *Wisconsin*, 338 U. S. 251, 94 L. ed. Adv. Ops. 20, 70 S. Ct. 1, 18 U. S. Law Week 4003. (No. 20, decided November 7, 1949.)

Wisconsin levied death taxes upon an estate of a resident amounting to $7,849,714.84, of which property valued at $6,869,778.61 was located in Wisconsin; the remaining property, valued at $979,936.23 was real and tangible personal property located in Illinois and Florida. An appeal from a decision of the Wisconsin Supreme Court challenged the validity, under the Fourteenth Amendment, of the Wisconsin tax known as the Emergency Tax on Inheritances, which, in substance, amounted to 30 per cent of the state's share of the 80 per cent federal estate tax credit for local taxes (allowed by §301 (b) of the Internal Revenue Code). The Federal Estate Tax is measured by the entire estate. The Wisconsin Normal Inheritance Tax and Estate Tax had already absorbed Wisconsin's full share of the 80 per cent federal credit.

Mr. Justice CLARK delivered the opinion of the Court reversing. He holds that the Wisconsin tax included property located in Illinois and Florida. While the court has "consistently upheld the domicile's levy when it was based upon intangible property with technical title without the jurisdiction", he says, "when a state reaches beyond its borders and fastens upon tangible property, it confers nothing in return for its exaction. . . . And if the state has afforded nothing for which it can ask return, its taxing statute offends against that due process of law it is our duty to enforce".

Mr. Justice BLACK dissented, noting that the decision logically follows from *Frick* v. *Pennsylvania*, 268 U. S. 473, but stating that, as there interpreted, the Due Process Clause gives a more expansive control over state tax legislation than the clause justifies.

Mr. Justice DOUGLAS took no part in the consideration or decision of the case.

The case was argued by Alexander W. Schutz for Treichler, and by Harold H. Persons for the State of Wisconsin.

WAR

Under Selective Service Act, Neither Veteran's Right of Seniority Nor Court's Power To Entertain Suit To Vindicate Right Ends at Expiration of First Year of Reëmployment

■ *Oakley* v. *Louisville and Nashville Railroad*, *Haynes* v. *Cincinnati, New Orleans and Texas Pacific Railway Company*, 338 U. S. 278, 94 L. ed. Adv. Ops. 85, 70 S. Ct. 119, 18 U. S. Law Week 4017. (Nos. 28 and 29, decided November 14, 1949.)

In these cases, the Court decided that, under the Selective Training and Service Act of 1940, 54 Stat. 890, the one year of reëmployment of a veteran by his preservice employer did not terminate his right to seniority after that period, and that a United States District Court could entertain an action brought by the veteran, after the expiration of the year, to enforce his right to such seniority.

In an opinion written by Mr. Justice BURTON, it is noted that the Court had previously ruled that the Act entitled the veteran to be restored to a position that, under the "moving escalator of terms and conditions affecting that particular employment, would be comparable to the position which he would have held if he had remained continuously in his civilian employment," *Fishgold* v. *Sullivan Drydock and Repair Corp.*, 328 U. S. 275. Mr. Justice BURTON says that, if a veteran was entitled to a higher rating because of seniority upon his reëmployment, the Act does not deprive him of that rating merely because of the expiration of his first year of reëmployment, and that it does not establish a one-year statute of limitations upon the assertion of his

initial rights.

Mr. Justice JACKSON concurred in the result.

Mr. Justice DOUGLAS took no part in the consideration or decision of the cases.

The cases were argued by Morton Lipten for the petitioners, and by C. S. Landrum, Cornelius J. Petzhold and Richard R. Lyman for the railroads.

UNITED STATES

Federal Tort Claims Act Does Not Apply to Claims Arising on Military Bases Leased by the United States from Britain

■ *United States* v. *Spelar*, 338 U. S. 217, 94 L. ed. Adv. Ops. 15, 70 S. Ct. 10, 18 U. S. Law Week 4012. (No. 42, decided November 7, 1949.)

Spelar, an employee of American Overseas Airlines, was killed in an airplane crash at Harmon Field, Newfoundland, an airbase leased for ninety-nine years by Great Britain to the United States. The administratrix brought this action against the United States under the Federal Tort Claims Act, alleging that the accident was the result of negligent operation of Harmon Field. The District Court held that the claim was one "arising in a foreign country", and dismissed. The Court of Appeals for the Second Circuit reversed, relying upon *Vermilya-Brown* v. *United States*, 335 U. S. 377 (1948), see 35 A.B.A.J. 60, January, 1949, where the Supreme Court held that the Fair Labor Standards Act applied to such leased military bases.

Mr. Justice REED delivered the opinion of the Supreme Court reversing. The Court of Appals erred in its interpretation of the *Vermilya-Brown* case, he says, for there it was said that the arrangements under which the leased bases were acquired from Great Britain "did not and were not intended to transfer sovereignty". The history of the Federal Tort Claims Act in Congress indicates that it was unwilling to subject the United States to liabilities depending upon the laws of a foreign power, he observes, whereas the Fair Labor Standards Act, under consideration in *Vermilya-Brown*, has a different legislative record and uses different language.

Mr. Justice FRANKFURTER wrote a concurring opinion in which he says that he agrees that the Tort Claims Act is inapplicable at the Newfoundland base, but that to rest the decision upon a distinction between the words "foreign countries" and "possessions" does not "recognize the scope of supple words that are the raw materials of legislation and adjudication and is unmindful of those considerations of policy which underlie . . . seeming variant decisions." The considerations which led him to dissent in *Vermilya-Brown*, he explains, lead him to concur in the construction of the act here.

Mr. Justice JACKSON wrote a concurring opinion, saying that he thinks that this case is inconsistent with the *Vermilya-Brown* decision and that he would reach the result in this case by a retreat from the doctrine of the latter case.

Mr. Justice DOUGLAS took no part in the consideration or decision of the case.

The case was argued by Samuel D. Slade for the United States, and by Arnold B. Elkind for Spelar.

LONDON LETTER

H. A. C. Sturgess • Librarian and Keeper of the Records, Middle Temple

▪ On September 22, 23 and 24, 1949, in the small scattered West Suffolk village of Groton, the three-hundredth anniversary of the death of John Winthrop was commemorated. Winthrop was born on January 12, 1587-8 at Edwardstowne in Suffolk and brought up in the life and environment of a country manor house. His definitely religious convictions led him to contemplate taking Holy Orders, but he was persuaded by his father to turn to the law, was admitted as a student of the Inner Temple in November, 1628, and took a more active part in his duties as a justice of the peace and lord of Groton Manor. In 1630 the great Puritan emigration to America began, and in March of that year, with a Royal Charter in their hands, these Englishmen who had pledged themselves to "inhabit and continue in New England, provided that the whole government, together with the patent for the plantation, be first by an order of Court legally transferred and established, to remain with us and others which shall inhabit upon the said plantation" set out in their small ships to found what was in reality an independent American Republic. John Winthrop became the first Governor of the Massachusetts Company in America and, by reason of his administrative ability and wise policy he reorganized the scattered and dispirited early settlement which he found there, and lived to see Boston become a thriving and prosperous capital, and the State of Massachusetts extend over a wide territory.

Among those present at Groton to do honour to the memory of Winthrop were Professor A. Newell, of the Winant Lecturer's Fellowship; Dr. Robert C. Dexter, Chairman of the U.N.A. World Executive; the Rev. G. L. Blackman of Harvard University; and Mr. Elisha C. Mowry, President of the Providence, Rhode Island, Branch of the English Speaking Union. Mrs. Helena Normanton, who represented the legal profession, in speaking of John Winthrop, said "we must not forget the great work he did in taking with him the common law, which forms the basis of American justice today".

Speeding Litigation

The Committee on Supreme Court Practice and Procedure, which was appointed on April 22, 1947, has recently published an Interim Report. The Committee was appointed to (1) enquire into the present practice and procedure of the Supreme Court (excluding the practice and procedure in actions for the infringement of patents and under the Patents and Designs Acts, 1907 to 1946, and in matrimonial proceedings in the Probate, Divorce and Admiralty Division of the High Court, but including the practice and procedure on appeals from that Division), and to consider what reforms of such practice and procedure should now be introduced for the purpose of reducing the cost of litigation and securing greater efficiency and expedition in the despatch of business; (2) to consider the Reports made by the Hanworth Commission on the Business of the Courts and the Royal Commission on the Despatch of Business at Common Law, 1934-36, and to make recommendations generally on the proposals contained in those reports; (3) to consider, for the purposes aforesaid, whether any, and if so what, modifications should now be made in the present rights of appeal to, from or within the supreme court, other than appeals in matrimonial proceedings from courts of summary jurisdiction; and (4) to consider what appropriate machinery might be evolved to enable cases involving points of law of exceptional public interest, to be determined wholly or partly at the public expense.

The committee considered suggestions for the fixing of dates for hearing cases, and came to the conclusion that although a system of fixed dates is at present impracticable at Assizes, that such a system is practicable and ought to be instituted for all witness actions in the King's Bench Division, both jury and non-jury, but not for particular judges. The fixing of dates, it is suggested, should be undertaken by a master to be known as the Master in Charge of the Lists. The master should certify the probable length of each case on the summons for directions and should fix the time within which the case should be entered for trial. There should be a speedy trials list for cases which a judge or master has certified ought for some special reason to have an early date for trial. It is also advised that where counsel is briefed in a case in a lower court which is fixed for hearing on the same day as he is due to appear in the House of Lords, he should return his brief in the lower court unless this would cause manifest injustice to the litigant, in which case he should return his brief in the House of Lords, or obtain permission from the House of Lords for his temporary absence. The committee is of opinion that a general system of "fixed dates" for trials would achieve a substantial saving of costs, but it would involve an appreciable waste of judicial time. It is, however, generally admitted that it would be preferable, in the public interest, to have some wastage of judges' time rather than to continue to waste the time of litigants, lawyers, witnesses and others.

Much evidence was taken on the length of vacations and hours of work done by the judges. The Long Vacation has been ten weeks and the Christmas vacation three weeks. It is noted that the historical reason for the length of the Long Vacation was

to allow for the gathering of the harvest. The bar council were in favour of reducing the Long Vacation to seven weeks and retaining the Christmas vacation as at present; but the general view of those who gave evidence was that the Long Vacation should be reduced to eight weeks, namely from the beginning of August, as now, until the last week in September, and that the Christmas vacation should be shortened by one week. This was the recommendation made by the committee. A good deal of thought was also given to the question of hours of work, and it was agreed that the present hours, 10:30 A.M. till 4 P.M. were unjustifiably short. An increase of the normal hours for sitting, which should be from 10:30 A.M. to 1 P.M. and from 2 P.M. to 4:30 P.M. was recommended. It was pointed out that the position on circuit is entirely different, owing to the great amount of business to be transacted, and that the judges frequently sat till 6 or 7 P.M. or even later. This, it was considered, was an obvious defect in the fair administration of justice as witnesses might go into the box tired and jurymen might also be tired and inattentive. It was therefore recommended that the Court should not normally sit after 5 P.M. The proposals for lengthening London hours and shortening vacations were dependent upon the provision of more judges and it was suggested that the appointment of four additional judges should be authorized by Parliament. This would naturally entail the provision of more courts and an increase in staff, and it was recommended that plans for the construction of four additional courts at the Royal Courts of Justice should be immediately undertaken.

Frederick H. Stinchfield

(Continued from page 195)

Wheeler's writing which begins: "No change in S. C. No proctor. No roving judge." It ends as a commentary upon "the nine old men"; "New judges on basis of need, not age." The other is an expression of the position of the Senate Judicial Committee signed by the several senators which recites in the first paragraph: "We recommend the rejection of this bill as a needless, futile, and utterly dangerous abandonment of constitutional principle." The report concludes, "It is a measure which should be so emphatically rejected that its parallel will never again be presented to the free representatives of the free people of America."

Born in Danforth, Maine, in 1881, Mr. Stinchfield was graduated from Bates College, and subsequently spent a year teaching in the Philippines. He then attended Harvard Law School, being graduated from that institution in 1905. He practiced in New York City for four years, but being urged by a fellow classmate, he moved to Minneapolis. In 1918 he organized the firm of Jamison, Stinchfield and Mackall, predecessor to the present firm of Stinchfield, Mackall, Crounse and Moore, of which at the time of his death he was the senior partner. For forty years he was regarded as one of the outstanding lawyers of the Northwest.

He was commissioned a major in the Judge Advocate's Department in World War I. He was a charter member of the American Law Institute, a member of the National Economy League and a member of the American Historical Society. He served as president of the Hennepin County Bar Association in 1923, and of the Minnesota State Bar Association in 1927. His ability was recognized by the conferring upon him of several honorary degrees.

He was a great trial lawyer. He had a keen, penetrating mind and a profound knowledge of the law, which made him an adversary respected and feared. No lawyer ever twice made the mistake of assuming that because Mr. Stinchfield's stature was a bit below that of the average man it was indicative of his mental acumen, or made him any less an opponent. His deep reverence for the law and his respect for judicial position—not necessarily for the men who occupied it—did not deter him from taking sharp issue with any court if he thought the court was wrong. When a decision was a departure from what he deemed to be the basic law of the land or from the principles of justice which had been established as fundamental, he expressed himself unmistakably.

He was a prolific reader, especially in the last few years of his life when he was under restraint as to his customary out-of-door activities. But he was not the kind of reader who belongs to book clubs. He read what he wanted to, not what someone thought might be good for him.

There are some who will remember Hal Stinchfield for the geniality of his companionship, some for his infectious laughter, and others for his ability to look at one with an extraordinary directness. But everyone will remember his unusual voice, completely controlled, kindly and understanding when the occasion demanded, stern, penetrating and overpowering when necessity arose. It was commanding, yet persuasive, with a musical quality never to be forgotten.

Above all, he was an individualist. No one was ever more so. He resented any interference with man's basic individual rights, and particularly the government's invasion of such personal rights. He feared for this nation the trend of the decisions of our highest courts made in the past few years. He saw in the new political and legal philosophy an undermining and weakening of the principles upon which this nation had been established. With his death we lost not only a brilliant lawyer, but a strong opponent of centralization of power in the Federal Government, and a great advocate of constitutional government.

Courts, Departments and Agencies

E. J. Dimock • **EDITOR-IN-CHARGE** **Lydia A. G. Stratton** • **ASSISTANT**

Aviation . . . air space . . . despite CAA's ruling that water tower near airport constituted aeronautical hazard, airport's injunction suit is barred for failure to object to proposed construction of tower or subsequently to undertake certiorari proceedings, and for inability to prove irreparable damage.

■ *Roosevelt Field, Inc., et al.* v. *Town of North Hempstead et al.*, U.S.D.C., E.D. N.Y., January 11, 1950, Byers, J.

Plaintiff, the operator of an airport, on behalf of itself and users, and certain users, on their own behalf, sought to enjoin the continued operation by defendants of a water-supply tower on a site in the vicinity of the airport. It was alleged that the water tower constituted an aeronautical hazard in violation of CAA regulations, and that there had been a "taking" by defendants of property in the public domain through which plaintiffs had "freedom of transit". It appeared from the evidence that defendant water district commissioners and town board had erected the water tower in accordance with applicable legal requirements.

The Court ruled that, despite a CAA ruling that the tower was an aeronautical hazard, plaintiff's injunction suit was barred by its failure to file timely objections to the erection of the tower or subsequently to undertake certiorari proceedings after the plans were approved and adopted, and by its inability to prove that it suffered irreparable damage caused by the presence of the tower. With regard to plaintiff's analogy between the sovereignty of the Federal Government in the air space above the United States and that over navigable waters, the Court, conceding the parallel, pointed out that, while Congress had prohibited the erection of certain structures in navigable waters, it had not done so in the air space. Rejecting plaintiff's plea that its property had been "taken", the Court maintained that plaintiff had no property in the air space lying above the lots containing the tower and water supply system, nor had it demonstrated that it or its users had suffered an impairment of their "freedom of transit" in or through the turning and maneuvering zone used by aircraft operating in or out of the air field. The Court observed that, although the "turning zone" was considered from the aviator's standpoint to be part of the airport, the law had not so decreed. "It is a space in the air, not lying above an airport, but adjacent to that which does, in which supervision for the purpose of ordered navigation is vested by law in the CAA, but that supervision is by no means synonymous with appropriation; it has for its objective an intelligent integration of navigation on the part of air craft, in their relations one to another."

EDITOR'S NOTE: The omission of a citation to the United States Law Week or to the appropriate official or unofficial reports in any instance does not mean that the subject matter has not been digested or reported in those publications.

Aviation . . . irregular carriers . . . CAB need not suspend or revoke irregular air carrier's letter of registration as condition precedent to obtaining injunction restraining carrier from engaging in unauthorized regular air service in violation of § 401(a) of Civil Aeronautics Act.

■ *CAB* and *The Administrator of Civil Aeronautics* v. *Modern Air Transport, Inc.*, C.A. 2d, January 6, 1950, Clark, C.J.

Defendant, an irregular air carrier, appealed on jurisdictional grounds from a District Court order granting the CAB a preliminary injunction restraining defendant from engaging in unauthorized regular air service in violation of § 401 (a) of the Civil Aeronautics Act of 1938, which authorizes regular air service only upon the issuance of a certificate of public convenience and necessity. It was not disputed that the flights of defendant's aircraft exceeded in frequency and regularity those authorized by its registration as an irregular air carrier under § 292.1 of the Board's Economic Regulations, which exempts carriers so registered from the prohibition of § 401 (a) against engaging in air transportation without a certificate of convenience and necessity. The injunction was granted under § 1007 (a) of the Act giving jurisdiction to the district courts to enjoin violation of § 401 (a). Invoking the doctrine of "primary administrative jurisdiction", the carrier contended that so long as its letter of registration as an irregular air carrier had not been suspended its exemption from § 401 (a) was absolute and complete, and that the court had no jurisdiction to enjoin its unauthorized regular service until the Board had first suspended or revoked its letter of registration. The order granting the injunction was affirmed.

In upholding the District Court's jurisdiction of the suit, the Court ruled that it was not necessary that the Board suspend or revoke an irregular air carrier's letter of regis-

tration as a condition precedent to obtaining an injunction curtailing the carrier's unauthorized regular service. "A re-reference to the Board to decide whether it was correct in seeking an injunction under the statute," the Court stated, "can be only a delaying formalism peculiarly undesirable in the application of the vital controls needed for aircraft." Since defendant carrier had been offering regular service it was no longer considered to be an irregular air carrier entitled to the exemption under § 292.1, but was deemed to be subject automatically to § 401 (a) of the Act. The Court maintained that the doctrine of primary administrative jurisdiction, under which the courts will not determine a question within the jurisdiction of an administrative tribunal prior to the decision of the tribunal where the question demands the exercise of administrative discretion requiring the special knowledge and experience of such tribunal, was inapplicable in the instant case since the issue was one of the violation, rather than the reasonableness, of an administrative regulation.

Evidence . . . witnesses . . . psychiatric testimony held admissible in federal criminal proceeding to impeach government witness whose credibility was a major issue.

■ *U. S.* v. *Hiss,* U.S.D.C., S.D.N.Y., January 4, 1950, Goddard, D.J.

In a memorandum opinion, the Court ruled that psychiatric testimony was admissible in a federal criminal proceeding to impeach the testimony of a government witness whose credibility was a major issue and upon whose testimony the outcome of the trial largely depended. The existence of insanity or mental derangement was deemed admissible for the purpose of discrediting a witness, such evidence of insanity being not merely for the judge on the preliminary question of competency but going to the jury to affect credibility. It was noted that there were no federal cases dealing with the "comparatively modern innovation" of using psychiatric testimony to impeach the credibility of a witness, although there were some state cases in which such testimony had been held admissible or which indicated that it would have been admissible if the question had been presented. Reference was made to 3 *Wigmore on Evidence* and the American Law Institute's Model Code of Evidence as advocating the admission of psychiatric testimony.

Evidence . . . self-incrimination . . . admission in evidence of chemical analysis of blood taken from accused reckless driver without force and before arrest, but at a time when accused was not shown to have been capable of consent, did not violate New Hampshire constitutional prohibition against self-incrimination.

■ *State* v. *Sturtevant,* N.H. Supreme Ct., January 3, 1950, Duncan, J.

On appeal from a conviction for reckless driving resulting in death, the Court held, *inter alia,* that the admission in evidence of a chemical analysis of blood taken from the accused driver without force and before arrest, but at a time when the accused was not shown to have been capable of consent, did not violate the New Hampshire constitutional prohibition against self-incrimination. Noting the lack of agreement among the authorities upon this issue, the Court ruled that the privilege against self-incrimination pertained to testimonial compulsion only and was inapplicable to cases such as this where the evidence was real rather than testimonial. The Court pointed out that there was no "assertion" involved here, as would be the case in the confession of a crime, and hence inducement by "threat, promise, fear or hope" could not affect the analysis to which the objection related. In distinguishing such cases as *State* v. *Weltha,* 228 Ia. 519, where comparable evidence was held inadmissible because of constitutional provisions against unreasonable search and seizure, the Court pointed out that no objection was made in the instant case based upon the provisions of the Fourth Amendment to the Federal Constitution; moreover, the federal rule, by which evidence secured through an illegal search and seizure is excluded (*Weeks* v. *United States,* 232 U. S. 383), was not deemed binding upon the states. The doctrine of the *Weeks* case, it was stated, had not been adopted in New Hampshire either before or since its announcement.

Government Contracts . . . bankruptcy . . . procedure prescribed by Contract Settlement Act of 1944 for recovery by contractor of compensation for termination of war contract is exclusive . . . contractor's trustee in bankruptcy has no interest in amounts that Government undertakes to pay direct to subcontractor pursuant to option in contract since subcontractor is third party beneficiary.

■ *Daniel Hamm Drayage Company* v. *Willson, Trustee,* C.A. 8th, December 30, 1949, Gardner, C.J.

The bankrupt, Laister-Kauffmann Aircraft Corporation, was holder of a contract with the United States for the production of 100 cargo gliders for the sum of $14,068,377.50. This contract was terminated for the convenience of the Government pursuant to one of its express terms. The trustee in bankruptcy agreed with the United States, subject to approval of the bankruptcy court, for a settlement of the bankrupt's termination claim for $3,685,000. By the terms of the settlement the Government promised and undertook to make payment of the claims of subcontractors direct to the claimants.

In the District Court two objections were made to the approval of the contract: (1) that the settlement was not in the best interests of the estate since the amount payable by the Government was inadequate, and (2) that the trustee was not warranted in permitting direct payment to the subcontractors but should have insisted that the amounts payable be

turned over to him as assets of the estate. The District Court overruled both these objections and approved the contract. On appeal, the Court of Appeals affirmed.

In refusing to upset the determination of the propriety of the settlement, the Court agreed with the trial court that the only alternative to the acceptance of the settlement was the exclusive procedure prescribed by the Contract Settlement Act for review of the contracting agency's determination of the amount due under a terminated war contract. The expense and uncertainty of such a proceeding had influenced the District Court in approval of the settlement and the Court declared that it could not say that the lower court had abused its judicial discretion but that, on the contrary, it was disposed to the view that the discretion had been wisely exercised.

It was objected on appeal that the order violated the provisions of the Bankruptcy Act in that the trustee had consented that the subcontractors might be paid directly by the Government. In rejecting this contention the Court pointed out that, pursuant to §§ 7 (b) and (d) of the Contract Settlement Act of 1944 [41 USC 107 (b), (d)] and express provisions of the contract, the Government was permitted to make direct settlement with subcontractors under terminated contracts, that the Government had promised and undertaken to do so and that the contract between the Government and the prime contractor with respect to the claims of subcontractors was a contract for the benefit of the subcontractors under which they were third party beneficiaries. Under such circumstances it was held that the prime contractor had acquired no right to receive the money due them and hence that it had become no part of the bankrupt estate. Since the subcontractors' termination claims were not part of the assets of the bankrupt estate it was said that the Bankruptcy Act did not limit the right of the Government to pay the subcontractors directly. The nature of this right was expressed by saying, "The government by contract had the option at its discretion to assume privity of liability by paying directly."

Libel and Slander . . . actionable words . . . publication to church membership of heresy charge against clergyman is not actionable without proof of special damage.

■ *Creekmore* v. *Runnels*, Mo. Supreme Ct., 2d Division, December 12, 1949, *per curiam*.

Plaintiff, an ordained Baptist minister, appealed from the judgment dismissing his action for libel and slander, in which he alleged that a publication to the church membership by the deacons, clerk and pastor of the church charging plaintiff with heresy was damaging to him in his capacity, character and profession of a clergyman and libelous *per se*. The Court affirmed the judgment and ruled that the general charge of "heresy" against a clergyman in a church disciplinary proceeding was not actionable without proof of special damage. Pointing out that all disparaging language which brings a clergyman into disrepute or which merely imputes that he has done something "wrong" is not actionable without proof of special damage, the Court stated that to be actionable *per se* the language must "impute a lack of integrity or misconduct importing a moral or mental unfitness in him to discharge his duties as a clergyman." The Court did not agree that the special character and dignity of a clergyman's office enhanced his right to protection from derogatory imputations of language or warranted a special rule applicable only to clergymen and not to other professions. It was conceded that in some connotations a charge of heresy, "if its suggestive significance is explicitly set forth", would be injurious to a clergyman in his professional character, but the Court maintained that "in the present [connotation] it may not be said that the charge and publication of such a broad, nebulous abstraction is in and of itself so defamatory as to necessarily injure" plaintiff in his profession. It was pointed out that heresy is no longer an offense against the state and as an offense against the church is not now regarded as necessarily "excluding from the fellowship of believers those who thus come under the ban of ecclesiastical censure or disapproval."

National Defense . . . Military Renegotiation Policy and Review Board . . . contracts and subcontracts exempted from renegotiation are specified.

■ Code of Federal Regulations, Tit. 32, Ch. IV, Subch. D, Pt. 423, § 423.354 (15 Fed. Reg. 170).

Publication was made in the *Federal Register* of January 12, 1950, by the Military Renegotiation Policy and Review Board of the addition to Part 423 of a new § 423.354 setting forth the general classes or types of contracts and subcontracts which have been exempted from renegotiation.

Contracts for the sale or rental of any interest in existing real estate, as well as contracts and subcontracts for the sale or exchange of tangible property used in the trade or business of the vendor, are exempt, when profits can be established when the price is established. Similarly exempt are contracts and subcontracts with public utilities for the delivery of electric power, the delivery of gas, the furnishing of water or steam or the removal of sewage, the furnishing of transportation by common carriers and for the service of transmitting messages by telephone, telegraph, cable, or radio or furnishing other communication services, when made at published rates subject to public regulation or at rates that are no higher than such rates.

The exemptions also apply to contracts calling for the performance of personal or professional services by an individual contractor, but do not apply to contracts where perform-

ance is contemplated by a firm or organization. In addition, the following classes of subcontracts are exempt: (1) the sale, furnishing or installation of machinery, equipment or materials used in the processing of an end product or of an article incorporated therein, provided that the subject matter of the contract does not become a part of the end product or any article incorporated therein; (2) the sale, furnishing or installation of machinery used in the processing of other machinery to be used in the processing of an end product or of an article incorporated therein; (3) the sale, furnishing or installation of component parts of or subassemblies for machinery equipment or materials included in (1) and (2); and (4) services performed in connection with the above subcontracts. This exemption of subcontracts does not apply where the purchaser of the machinery, equipment or materials has acquired them for the account of the Government.

Patents . . . *res judicata* . . . reversal by the Court of Customs and Patent Appeals of Commissioner's ruling denying a patent application does not preclude second rejection of the application by the Patent Office on the basis of an additional reference to the prior art not previously cited.

■ *Jeffrey Manufacturing Co.* v. *Kingsland*, C.A., D.C., December 12, 1949, Proctor, C.J.

The question presented was whether, after the Court of Customs and Patent Appeals had reversed the rejection of a patent application, the Patent Office could still deny the application on the basis of a newly discovered reference to the prior art not previously cited. The instant Court, affirming the judgment below dismissing appellant's complaint which sought to compel issuance of the patent, ruled that the decision of the Court of Customs and Patent Appeals was not *res judicata* as to appellant's right to letters patent, and that new grounds for rejection of the application could properly be advanced upon return of the case to the Commissioner.

Stating that it could find no controlling case directly in point, the Court maintained that the decision of the Court of Customs and Patent Appeals did not constitute a judgment or operate as a mandate to issue the patent. Its decision in such a § 4914 (35 USC § 62) proceeding was regarded as simply an instruction to be followed by the Commissioner regarding the particular points involved in the appeal. *Res judicata* was further considered inapplicable for the reason that protection of the "substantial" public interest in the granting of patents from harassment by unfounded claims of monopoly required that patent applications be refused where there was any "substantial, reasonable ground" within the cognizance of the Commissioner why such patents should not issue.

Public Utilities . . . transit radio music . . . installation and use of radios in public transportation vehicles deemed not inconsistent with public convenience, comfort and safety.

■ *In re Radio Reception in Busses and Street Cars of Capital Transit Co.*, Case No. 390, Public Utilities Commission of D.C., December 19, 1949.

The Commission, on its own motion, instituted an investigation to determine whether or not the installation and use of radio receivers on the street cars and busses of the Capital Transit Company was consistent with public convenience, comfort and safety. As of October 15, 1949, there were 212 radio sets installed by Washington Transit Radio, Inc., without cost to the Capital Transit Company, the installation of some 1300 additional sets being contemplated. The brief on behalf of the Transit Company took the position that there was no lack of safety involved in such installation, that the majority of the transit riding public accepted, enjoyed and benefited by the programs, and that individual or small minority group objections based upon asserted rights under the First or Fifth Amendments were without merit and irrelevant to any issues in the proceeding arising out of the Commission's statutory powers. The interveners and individuals opposing the radios contended, *inter alia*, that the use of radio receivers in public vehicles deprived riders of freedom to listen or not to listen in violation of the First Amendment, deprived them of liberty without due process, took their private property for private use in violation of the Fifth Amendment, would lead to thought control, impaired the health of the riders, threatened the safety of operation, and adversely affected a significant number of riders and operators.

Setting forth its authority to direct such changes in equipment or condition of the public vehicles as were necessary to promote the public comfort, convenience or safety, the Commission ruled that the installation and use of radios in street cars and busses was not an obstacle to safety of operation and did not impair the public comfort and convenience, but rather, it was stated, "through the creation of better will among passengers, it tends to improve the conditions under which the public ride." Asserting that its decision was based on something "more tangible than impassioned pleas which reflect personal feelings," the Commission concluded from the testimony presented that the objections to the radios were without sufficient basis. It cited a public opinion poll of passengers in October, 1949, in which 76.3 per cent of those interviewed said they favored the radio, 13.9 per cent did not care one way or another, 6.6 per cent were not in favor of it, and 3.2 per cent had no definite opinion.

[After hearings before the New York Public Service Commission the New York Central Railroad Company voluntarily discontinued on December 21, 1949, the practice of broadcasting music, information and "commercials" in the Grand Central Station, New York City.]

Radio Communication . . . Federal Communications Act . . . religious organization cannot maintain action in federal district court under Act for enforcement of contract with radio station for broadcasting of sermons.

▪ *Massachusetts Universalist Convention* v. *Hildreth & Rogers Co.*, U.S.D.C., D. Mass., December 22, 1949, Ford, J.

Plaintiff religious organization, seeking in the federal district court damages and enforcement of a contract entered into with defendant broadcasting station in which defendant agreed to furnish its broadcasting facilities for a series of sermons prepared by plaintiff, alleged that defendant refused to broadcast an Easter sermon, treating the Resurrection as purely metaphorical and spiritual, on the ground that those views would be shocking to general public sensibility and hence that the broadcasting of it would be a violation of defendant's duty under the Federal Communications Act to operate its station in the public interest. Plaintiff contended that, by virtue of its contract with a licensee required under the Act to broadcast in the public interest, it had a vested and judicially enforceable right, notwithstanding any contractual provisions for rejection of programs, to have its material broadcast except when the content of the broadcast was not in the public interest, and that it was for the court to decide whether or not the rejected program was in the public interest. Defendant moved to dismiss for lack of jurisdiction and for failure to state a claim upon which relief could be granted. The Court found that it had jurisdiction over the action since it raised a question involving the interpretation of a federal law, but held that the complaint set forth no claim under the Federal Constitution or the Communications Act upon which relief could be granted.

In rejecting plaintiff's interpretation of the Communications Act, the Court maintained that the Act's enforcement and the development of the concept of "public interest" were entrusted primarily to the Federal Communications Commission, and that the only function of the courts in enforcing the Act was the exercise of the right to enforce or review orders of the Commission under §§ 401 and 402. To hold otherwise, it was stated, would limit the Commission's freedom of action and thus defeat the successful operation of administrative enforcement. Determination of what was in the public interest was said to involve the question whether the "allocation of the available facilities at any given time and under any given circumstances is more conducive to the public interest than some other possible allocation." It was emphasized that the mere fact that one party to a broadcasting contract was a licensee under the Act did not give the other contracting party "any greater rights than those which the law ordinarily gives to parties to a contract."

Radio Communication . . . licenses . . . FCC may deny radio broadcasting license to newspaper company where its business practices in advertising and news dissemination are found to be monopolistic in character.

▪ *Mansfield Journal Co.* v. *FCC*, C.A., D.C., January 23, 1950, Washington, C.J.

Appellant newspaper company appealed from a decision of the FCC denying the company's applications for licenses to construct FM and AM radio stations in Mansfield, Ohio, on the ground that the granting of the licenses would be inconsistent with the public interest in view of appellant's monopolistic business practices in advertising and news dissemination. The Commission found that the *Mansfield Journal* had used its position as the sole newspaper in the community to coerce its advertisers to enter into exclusive advertising contracts with it and to refrain from advertising on the local radio station, the only other news medium in the town. The newspaper also declined to publish the radio station's program log and failed to print any comments about the station unless unfavorable. The Commission concluded that the newspaper's actions were intended to suppress competition and to secure a monopoly of mass advertising and news dissemination, and that such practices were likely to continue and be reënforced by the acquisition of a radio station. Appellant contended, *inter alia*, that the consideration of its competitive activities as a newspaper was beyond the Commission's jurisdiction, that the administrative action constituted an *ultra vires* attempt to enforce the antitrust laws, that the Commission's determination was equivalent to adjudicating appellant guilty of a crime without trial by jury in violation of the Sixth Amendment, and that the denial of a license to appellant constituted an invasion of the freedom of the press in violation of the First Amendment.

Affirming the decision of the FCC, the Court held that it was fully within the Commission's jurisdiction to inquire into appellant's alleged monopolistic business practices and to deny the licenses upon its finding that such practices had in fact taken place and were likely to carry over into the operation of the radio station. The Court ruled that it was contrary to the "public convenience, interest and necessity" to grant a license to a newspaper which had attempted to suppress competition in advertising and news dissemination. Rejecting appellant's contention that the Commission's determination amounted to enforcement of the antitrust laws, the Court stated that, whether or not the newspaper's competitive practices were legal or illegal under the antitrust laws, the Commission was not precluded from taking such practices into consideration in evaluating appellant's ability to serve the public. The Court cited Mr. Justice Frankfurter's statement in *National Broadcasting Co.* v. *United States*, 319 U.S. 190, that there was nothing in the Federal Communications Act denying to the Commission the power "to refuse a license to a station not

operating in the 'public interest', merely because its misconduct happened to be an unconvicted violation of the antitrust laws".

The Court further maintained that the Commission's findings did not amount to a conviction of a crime without a trial, since their sole purpose was merely to determine appellant's qualifications to become a licensee. Nor was the withholding of a license deemed a penalty when there was sound basis for finding the applicant unfit. Pointing out that the Commission did not attempt to censor the newspaper's editorial policy, the Court stated that the FCC was not precluded by the First Amendment from considering appellant's competitive practices in the light of the general public interest.

United States . . . false claims . . . informer's false claims suit under 31 USC § 231 alleging knowledge of and participation in fraud by government officials is not precluded by provision barring such suits where based on evidence or information in possession of United States or any agency, officer or employee thereof.

■ *U.S.* v. *Rippetoe et al.*, C.A. 4th, December 30, 1949, Parker, C.J.

In an informer's suit instituted under 31 USC §§ 231 and 232 to recover on account of alleged fraud in the presentation of a claim against the United States, it was alleged that there was corruption on the part of government officials dealing with the claim. Summary judgment was granted for defendant on the ground that the court lacked jurisdiction to entertain the suit by reason of the statutory provision barring "any such suit" whenever it is made to appear that the suit was based upon evidence or information in the possession of the United States or any agency, officer or employee thereof, at the time the suit was brought. The ruling was held erroneous on appeal.

The Court held that knowledge on the part of government officials who were implicated in the fraud did not preclude a false claims suit by the informer, since such a suit was not deemed to be based upon "evidence or information in the possession of the United States" within the meaning of the provision barring actions based on such evidence. The Court considered it "hardly likely" that Congress intended to forbid informers' suits under these circumstances, and maintained that the history of the provision showed that its purpose was "not to bar bona fide suits by informers merely because corrupt officials of the government might have participated in the fraud or refused to prosecute it, but to prevent the bringing of parasitical actions by those who sought to profit from governmental investigations or prosecutions by using the evidence which these had developed." Any other construction, it was stated, "would in large measure emasculate the statute and deprive the public of its benefit in cases where it is most needed."

Further Proceedings in Cases Reported in this Division.

■ The following action has been taken in the United States Supreme Court:

CERTIORARI DENIED, January 9, 1950: *State of Maryland* v. *Baltimore Radio Show, Inc.*—Constitutional Law (35 A.B.A.J. 330, 679; April, August, 1949).

JURISDICTION POSTPONED, January 16, 1950: *Colonial Airlines, Inc.* v. *Adams et al.*—Aviation (36 A.B.A.J. 56; January, 1950).

■ The following action has been taken by the United States Court of Appeals for the Fourth Circuit:

AFFIRMED, December 19, 1949: *Jefferson* v. *U.S.*—United States (34 A.B.A.J. 607; July, 1948).

■ The following action has been taken by the New York Court of Appeals:

AFFIRMED, December 29, 1949: *Chamberlain et al.* v. *Feldman et al.*—Literary Property (35 A.B.A.J. 234; March, 1949).

■ The following action has been taken by the New Jersey Supreme Court:

AFFIRMED, January 9, 1950: *Imbrie et al.* v. *Marsh et al.*—Public Officers (35 A.B.A.J. 1021; December, 1949).

■ The United States District Court for the Eastern District of New York, on January 11, 1950, awarded judgment on the merits to defendants (see *supra*, page 221): *Roosevelt Field, Inc., et al.* v. *Town of North Hempstead et al.*—Aviation (35 A.B.A.J. 675; August, 1949).

■ The United States Court of Appeals for the Seventh Circuit, on December 19, 1949, affirmed the District Court in denying damages for employer's failure to restore veteran although such failure had been declared unlawful in the earlier decision of Court of Appeals reviewed in A.B.A.J.: *Levine* v. *Berman*—Veterans (33 A.B.A.J. 726, 1223; July, December 1947).

"Books for Lawyers"

ECONOMIC GEOGRAPHY OF THE U.S.S.R. *Edited by S. S. Balzak, V. F. Vasyutin and Ya. G. Feigin. American edition edited by Chauncey D. Harris. Translated by Robert M. Hankin and Olga Adler Titelbaum. Preface by John A. Morrison. New York: The Macmillan Company. $10. Pages 620.*

HISTORY OF THE NATIONAL ECONOMY OF RUSSIA TO THE 1917 REVOLUTION. *By Peter I. Lyashchenko. Translated by L. M. Herman. Introduction by Calvin B. Hoover. New York: The Macmillan Company. $13. Pages 880.*

In the light of President Truman's announcement on September 23, 1949, to the effect that, "We have evidence that within recent weeks an atomic explosion occurred in the U.S.S.R.", these two books assume added significance.

In all probability, Soviet Russia's atomic piles are situated somewhere in the Kirghiz and the Tadjik Republics, near the sources of the raw materials, particularly the deposits of uranium. The geographic contiguity of the newly established industrial centers in Soviet Central Asia to the sources of uranium is not accidental. Strategically, Kirghizia and Tadjikistan are invulnerable. These areas appear to be well protected from invasion by land or attack from the air by the impassable peaks and glaciers of the Tyan-Shan and Pamir-Alay mountains. Symbolically, two peaks guard the entrance to non-Soviet Asia: Lenin Peak (7127 meters, nearly 24,000 feet high) and Stalin Peak (7495 meters, nearly 25,000 feet).

Equally invulnerable is the area in Soviet South Asia, between Alma Ata and Sinkiang (Chinese Turkestan), which is ideally situated for experimentation with atomic explosions.

On previous occasions[1] I have called attention to the accelerated industrialization of Soviet South and Central Asia. Shortly after the Stalin regime entrenched itself in power, the consummation of the first Five-Year Plan (announced in October, 1928) was accelerated to an unheard of tempo. At that time two major long-range programs, among other things, were undertaken by the Soviet Government: one, the integration of military, political, and social activities in the Far East, particularly in China, and more specifically in Sinkiang; two, comprehensive geological explorations throughout Soviet Asia.

During the thirties, Russian technical publications and academic journals were replete with reports and analyses of geological explorations and other cognate economic activities that were conducted throughout Soviet Russia. By 1929, only about 18 per cent of the whole area of the U.S.S.R. had been explored by geologists. In the middle thirties, 35 per cent had already been explored. By 1940, new expeditions had extended research to 66 per cent of the total surface of the then Soviet Russia. As far as we know now, these surveys and explorations were continued during World War II and in January, 1945, it was reported that about 73 per cent of all Soviet territory had been covered by mineralogical explorations.

True, uranium did not loom so importantly then. Therefore, Soviet explorers were more interested in gold, silver, copper, wolfram and other nonferrous metals. Obviously, with the development of the atomic bomb in the United States, the Soviet Government has greatly increased the development of its sources of uranium and it is reasonable to assume that additional sources of uranium, other ores and ingredients necessary in the production of atomic energy have been found and developed accordingly. Likewise, abundant deposits of thorium, important as a substitute for uranium, were also discovered in 1932 on the Eastern slopes of the Pamir Mountains.

These developments, events and trends are discernible after a discriminating and judicious examination of the two treatises under discussion. Both volumes facilitate the understanding of how the process of economic and industrial development varied from area to area, from time to time and from the Tzars to the Soviets.

The authors of *Economic Geography of the U.S.S.R.* are vituperative in their criticism of German and American geographers, particularly of Alfred Hettner and Ellsworth Huntington, for their sweeping generalizations concerning the backwardness of Russia and its people and for their leanings towards the ill-fated doctrine which upholds the superiority of the Nordic race.

Oddly enough, the American editors of this book attempt to apologize for the American geographer Ellsworth Huntington by explaining in a footnote that the Russian authors of this volume have not quoted fully from the writings of Professor Huntington. However, it is noteworthy to observe that the book,

1. See 31 A.B.A.J. 553, November, 1945, and 35 A.B.A.J. 212, March, 1949; also in *The American Journal of International Law*, July, 1945.

Europe, by Samuel von Valkenburg and Ellsworth Huntington, has been a widely used text in American colleges and universities for years. These authors have also been periodic advisers on economic geography to the State Department. In their textbook the conclusion is drawn that ". . . the Russian temperament does not appear to have that careful, exact, industrious quality which is noteworthy in people like the Scotch (page 594) . . . . there is little indication that on their own initiative the Russians can frame a system which will so far overcome their physical handicaps as to put them on a par with the countries around the North Sea" (Page 595).

Soviet Russia's production of atomic energy, the development of her huge submarine fleet and gigantic air power are, among other things, substantive refutations of the appraisals made by some American geographers and of the current wishful thinking of some political scientists and economists before, during and after World War II. As might have been expected, the "cold war", psychological warfare and their concomitant global tensions have produced strange phenomena the world over. So much so, that it is difficult to delineate the ebb and flow surrounding the East-West conflict. A fortnight ago, Soviet Russia and the United States were Allies—comrades in arms. Today they are avowed enemies.

During the war our spokesmen were prone to overestimate Soviet Russia's achievements. Now, in the midst of the "cold war", they are equally prone to underestimate her strength. Indicative of this cross-current anomolous trend in the United States are the two reports published by two former American ambassadors to Soviet Russia: *Mission to Moscow* by Joseph E. Davies and *My Three Years in Moscow* by Lt. Gen. Walter Bedell Smith. The first is replete with panegyrics concerning the Soviet System and reflects hope for a *modus operandi* with the Kremlin; the other is remorse coupled with despair and reflects the doctrine of the inevitability of war. Since one condones what the other condemns, these two "official" analyses cancel each other out.

Similar sins of omission were matched by the equally conspicuous sins of commission at the 1949 annual meetings of the American Political Science Association and of the American Economic Association. These tortuous appraisals of the Soviet System are symptoms of the serious damages the "cold war" and its corollary, the psychological warfare, have already inflicted on our academic institutions and on the American intelligentsia.

In view of this prevailing confusion, partly deliberate and partly inadvertent, the publication of these two books dealing with the character of the people and the economic geography of Soviet Russia are welcome guests, indeed. Also, Soviet Russia's aggressive expansion can thus be viewed in its proper perspective and her impact on international power politics is thus more clearly understood. These two books were published in 1940 and 1939, respectively; prior to World War II, and more important, prior to the development of the bomb and the subsequent "cold war." Of necessity, deposits of uranium and other ores and the development of strategic natural resources in Soviet Russia have become the most jealously guarded military secrets. The cross-current political implications are self-evident.

During the past three years I have repeatedly made the observation that a global war involving the U.S.S.R. and the U.S.A. appears to be further and further removed from the visible future. By the same token, the "cold war" and the currently raging psychological warfare between these two Great Powers is likely to linger on for decades, fluctuating in degree of intensity. It follows, therefore, that it is unlikely that books of comparable painstaking detail covering the politico-economic geography of Soviet Russia will be published in the foreseeable future. In fact, the second volume of *Economic Geography of the U.S.S.R.* is already not obtainable, hence could not be translated.

True to form, the authors of both books hew to the "Party line" and demonstrate their orthodoxy by copious references to and quotations from the writings of Marx, Lenin, Stalin and official dogma.

Their obvious subjectivity notwithstanding, both books are relatively tempered and present cumulative evidence of the historic continuity of the economic and political growth and development of Great Russia into Soviet Russia. The Soviets are intensifying those social forces at play which are consistent with deeply embedded Nationalism and Bolshevism. At no time in its history has the Soviet regime sacrificed fundamental Russian national interests in deference to Communism. Except in cases of temporary expediencies, they have consistently striven, and in a large measure have managed, to galvanize social discontent everywhere (and the world communist revolutionary movement, as well) in behalf of Soviet Russia, with emphasis on *Russia.* The distinguished prerevolutionary Russian historian, Vasily O. Klyuchevsky, once characterized Tzarist expansionism in these terms: "The State swelled and the people *grew thin*". It is not yet clear whether this observation is applicable with equal certainty to the growth of the Soviet Empire.

Economic Geography of The U.S.S.R. was published in 1940 and is a joint product of three editor-authors: S. S. Balzak is associated with the Socio-Economic Publishing House of the U.S.S.R. Vasily F. Vasyutin is associated with the Institute of Geography of the Academy of Sciences of the U.S.S.R. Ya. G. Feigin is associated with the Institute of Economics of the Academy of Sciences of the Ukrainian S.S.R.

This book is a thorough study of Soviet natural resources and industrial potential compiled by Soviet scholars and technicians. Exact locations of resources, industries, agricultural production, population, and transport are depicted on eighty-four maps. Detailed data are provided by

fifty-three statistical tables. An index to citations, a bibliography, an index of plants and animals, a gazetteer, biographical notes on persons mentioned are great aids to the general reader.

Since maps serve as a basic geographic tool, Professor Chauncey D. Harris has done an excellent performance in the compilation of *new* maps for the American edition. To many readers, this book contains a surprising amount of information, supplies a clear-cut exposition of economic theory as it is taught to the Soviet student of economic geography, and helps the reader to better understand the uncompromising Soviet Russian attitude toward capitalistic countries.

Economic Geography of the U.S.S.R. has been translated from the Russian by Robert M. Hankin and Olga A. Titelbaum. Regretfully, the translation and editorship of this volume fall short of the prodigious job done with the Lyashchenko book.

Since this textbook was published, Soviet Russia annexed 260,000 square miles and added about 24 million to its population. During the same ten-year period, she suffered war losses of about 20 million people. In 1946, the area was about 8,436,000 square miles, almost one-sixth of the land-surface of the earth not covered by icecaps; and the population approximated 193 million.

History of The National Economy of Russia to the 1917 Revolution was issued by the Institute of Economics of the Academy of Sciences of the U.S.S.R. and approved for use as a textbook of economics by the All-Union Committee on Higher Educational Institutions of the Council of People's Commissars of the U.S.S.R.

It covers the economic history of Russia from earliest times down to the Revolution of 1917, and contains much material drawn from primary sources. The book was first published in 1939. Since then, the State Publishing Board for Political Literature has brought out a new two-volume edition; the first volume was published in 1947 and the second in 1948. According to the translator's note, the new edition covers the same material as the 1939 volume, but bears no sponsorship by any scientific institution. However, the new 1947-48 two-volume edition contains more elaborate treatment of a *few* selected periods in history, such as the reign of Peter the Great and World War I. Obviously, this expansion is consistent with the ever-changing and latest "Party-line" of rewriting history.

Professor Peter I. Lyashchenko was born in 1876 in Saratov, Russia, and was an eminent Russian scholar and author of a number of outstanding works in the field of agricultural economics and Russian economic and agricultural history, especially of the eighteenth and nineteenth centuries, even prior to the October Socialist Revolution. He is a corresponding member of the Academy of Sciences of the U.S.S.R., a member of the Ukrainian Academy of Sciences, and an Honorary (meritorious) Worker in Science of the U.S.S.R. Professor Lyashchenko has also been a member of the American Economic Association, but resigned in 1938.

The competent and faithful translation of this definitive work by L. M. Herman deserves commendation. Would that Dean Calvin B. Hoover had written a more comprehensive introduction, although its brevity does not detract anything from its cogency.

Writing from the Marxist viewpoint of history, Professor Lyashchenko devotes about half of his space to the years 1861-1917. He gives particular attention to the economic history of the non-Russian peoples of the U.S.S.R. In this regard, his study is probably unique in its comprehensiveness. He also includes treatment of many little-known areas of Soviet Russia. His presentation throughout is clear, effective and easy to follow.

The book is of particular interest because it is a work of broad scope and significance written by a single person—unusual in Soviet Russia today, where groups or "brigades" of scholars are normally assigned to such a responsible project—hence it is a unique and significant contribution to both the historic and the economic literature on Russia.

The value of the book is increased by twenty-one rare and unusual maps showing the economic development of pre-revolutionary Russia, and its source of strength to the social milieu currently reconstructed under the Soviet System.

Irony of fate willed it so that these two books, which were first published in 1939 and 1940 in Soviet Russia, should assume added timeliness in 1950, particularly for Americans concerned with the conquest of China by Chinese Communists and with the last, if not fatal, stronghold of the Nationalist Government of China in Formosa. Both books are replete with information bearing on the historic continuity of Soviet Russia's paramount interest and far-flung activities in China and in its contiguous areas.

China is one area where Soviet Russia's long-term plans and historic objectives are effectuated with singular success. In fact, Sinkiang (Chinese Turkestan), a region rich in natural resources and in untapped mines of strategic materials, has been under Soviet Russian active influence since 1930. Soviet activities in this coveted region were only temporarily interrupted during the World War II, when Sinkiang fell under the "sphere of influence" of the Chinese government in Chungking. Moreover, the Politburo under the direction of Generalissimo Stalin is better equipped for a far-reaching expansionism into the Far East than in Europe politically, militarily, economically, psychologically and geographically. Clearly, costs entailed in further prosecution of Soviet expansionism in the Far East are comparatively small and the gains derived therefrom great. The geographic contiguity between Soviet Russia and Communist China serves to expedite the long-range objectives envisaged by the Kremlin.

These books are two of a series of important Russian works in translation, published by The Macmillan

Company in cooperation with the American Council of Learned Societies. According to the American editors, "the purpose of the project is to make available to the American public the best and most representative volumes of contemporary Russian writing in the humanities and social sciences. For it is only from books written by Russians and for Russian readers that Americans can obtain an adequate understanding of the Russian's conception of citizenship, of the Soviet constitution, of the role of the State, of Russian life and culture."

Because these books were originally designed not for purposes of foreign propaganda but for present-day use by the Russians themselves, these translations serve to show us an important section of Soviet thought. Taken together, these two volumes are a formidable compendium of data covering the vast human and fabulously rich natural resources of Soviet Russia and the creation of an autarchy of global and epoch-making proportions.

CHARLES PRINCE

New York, New York

SECOND THOUGHTS ON LIFE, LAW AND LETTERS. *By A. Laurence Polak. London: Stevens & Sons, Ltd. 1949. 6s. net. Pages 134.*

The healthy catharsis of satire is frequently sought by the English practitioner in the contemplative art of writing, as exemplified in the essays of A. P. Herbert and A. Laurence Polak. His American cousin, on the other hand, is prone to find release in such frenetic festivals as the "Christmas Spirits" of the Chicago Bar Association, "Twelfth-Night Festival" of The Association of the Bar of the City of New York, and the smoker ending the final day of the annual sessions of the Association of American Law Schools. While skepticism, ridicule and satire are by no means restricted to the English legal climate, we are fortunate that it has sought a more enduring form of expression in the printed page, which can be internationally shared, than the evanescent contributions of the American practitioner.

To his series on "Legal Fictions",[1] Polak has now added a volume of perhaps somewhat less extravagant imagination but equal delight. As one peruses his brief essays on the oddities of the law one is aware of the perturbing undertones of awful reality which is the basis of effective satire. The possibilities of a system of truly mechanical justice suggested in the comment on "Automatic Divorce" are already at hand in certain parking meter devices and await only the final step to appear in the traffic court itself. Law students may endlessly debate the implications of the dentist and patient's consent problem posed in "Peace with Teeth" and the contract and agency problems incident to the disposal of Aladdin's lamp in "New Lamps for Old". A most delightful conceit of describing a landlord and tenant litigation in musical terms appears in "Intermezzo". Much learning in history and mythology will be found in other essays such as "Mothers-in-Law".

You will enjoy *Second Thoughts.*

KENNETH S. CARLSTON

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FREEDOM UNDER THE LAW. *By Sir Alfred Denning. London: Stevens & Sons, Ltd. 1949. 8s. Pages 126.*

Another barrage has just been fired in the number one campaign of the Cold War—Operation Ideology. The weapon used is the voice and pen of Sir Alfred Denning, one of the Lord Justices of His Majesty's Court of Appeal in England. The ammunition consists of his four published lectures: "Personal Freedom", "Freedom of Mind and Conscience", "Justice Between Man and the State", and "The Powers of the Executive".

It is axiomatic that the struggle for the control of the minds of men can at all times be reduced to a conflict between propaganda and education. And whether the ideas expressed constitute one or the other depends entirely upon the point of view of those who have evaluated both schools of thought.

Thus, to the American lawyer, *Freedom Under the Law* can be considered in no other way than as an educational document, designed to acquaint the uninitiated with the blessings of liberty which constitute the Anglo-American heritage.

But this does not mean that the American lawyer will find himself in complete agreement with the expressed philosophies of modern British law. Certainly the majority of the American Bar opposes the "social revolution" in England which makes the State "responsible for seeing that all the supplies and services which are necessary for individual well-being are available to all". And certainly there can be little sympathy with Justice Denning's discussion of the American judiciary, in which he declares:

> The position here is very different from what it was at one time in the United States where, you will remember, President Roosevelt's new deal was nearly thwarted by a written constitution and by judges who were out of touch with the times: so much that it was only by the appointment of new judges to the Supreme Court that the legislation became effective.

The four lectures which make up *Freedom Under the Law* are the first of a series sponsored by the Hamlyn Trust to explain "to the common people of England and to further amongst them the knowledge of their laws so that they may realise their privileges and likewise their responsibilities." And, while these printed lectures certainly contribute little to the arts and science of our jurisprudence, they are valuable in the ideological struggle against the propagandists behind the Iron Curtain.

Justice Denning begins his discourse by stating that the concept of freedom is *expressed* in the laws of

1. *Legal Fictions* (London, 1945), *More Legal Fictions* (London, 1946), *Final Legal Fictions* (London, 1948).

many countries "but rights are no good unless you can enforce them; and it is in their enforcement that English law has shown its peculiar genius."

In discussing the question of "Personal Freedom", he contrasts the English and Soviet laws which have been promulgated against fifth columns, real and imagined. The British regulation—a war-time measure only—called for the detention of persons believed to be "of hostile associations or to have been recently concerned in acts prejudicial to the public safety". The Russian statute, on the other hand, authorizes the detention of persons "who are a danger either by reason of their dangerous associations or by reason of their previous activities"—and is a peace-time as well as a war-time measure. And to implement the tyranny of this statute, the law imposes upon every member of the State the positive duty of denouncing all "traitors". Thus the difference between a deprivation of liberty and a deprivation from access to military secrets.

Perhaps the best way of contrasting the judicial systems of the East and West is to examine the functions of their respective courts of law. In England, Justice Denning tells us, "we regard them as standing between the individual and the State, protecting the individual from any interference with his freedom which is not justified by the law. But Soviet Russia regards its tribunals as part of the state machine to carry out state policy".

And, the author explains, the Russian judges are empowered to carry out these policies by the Soviet Code itself which specifies that "if the Code has not made provision for any act which is socially dangerous, it is to be dealt with on the basis, and as carrying the same degree of responsibility, as the offences which it most nearly resembles".

Freedom Under the Law is not recommended to the busy lawyer about to embark upon a "busman's holiday". Nor will it find its place in the law libraries as a new landmark in Anglo-American jurisprudence.

But the book happily reminds the western world once again of the statement by Lord Mansfield that "to be free is to live under a government by law",[1] and the observation by John Adams that we have "a government of laws and not of men".[2]

ALBERT P. BLAUSTEIN
New York, New York

COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE. *By Jerome Frank. Princeton, New Jersey: Princeton University Press. 1949. $5.00. Pages x, 441.*

The word most frequently found in reviews of this author's works, particularly since his *Law and the Modern Mind*, is "provocative". Once again his latest book has brought forth this characterization, but in addition to being provocative, in that it runs the gamut of controversy in contemporary jurisprudence most stimulatingly, we may add the word, "provoking", because Judge Frank loses no opportunity to flay his adversaries if they disagree nor does he, in the heat and unquestioned sincerity of argument, stop short on occasion at the point of exaggeration in order to press home a point. There is no mistaking where the Judge stands on any proposition nor is there any doubt as to his view about others. He does it all excusably, however, in order "to provoke constructive skepticism" and "to help you peer behind legal myths".

His fundamental emphasis here, as in his recent addresses, lectures and law review articles of which this book may be deemed an able summary, is upon the neglect of fact-finding in litigation. "But the other part of the job of the courts—that part which is assigned almost entirely to trial courts—the ascertainment of the facts of individual law suits—presents a far more difficult, a far more baffling problem . . . . It is there that courthouse government is least satisfactory. It is there that most of the very considerable amount of judicial injustice occurs. It is there that reform is most needed . . . . Because of its importance and because of its neglect, I shall in this book deal chiefly with that subject. I shall, for the most part, concentrate on trials, trial courts and fact-finding."

With this initial indication of the thesis, we can anticipate the realistic flavor that will be sprinkled over all aspects of the subject. The promise is well kept. The courts—the judge and all phases of "courthouse government"—stand forth through vivid exposition and keen analysis of precisely what is going on in the day-to-day mill of litigation. Here is legal realism in all its vibrant glory, but legal realism of the Frankian styled variety of "fact-skepticism" as distinguished from the earlier and continuing branch of "rule-skeptics". He claims the latter group—and he names and criticizes its adherents with avidity—desires to be deceived and remain oblivious to difficulties about fact-finding. They are, according to him, victims of modern legal magic. This is but a sample of the overemphasis that succeeds in stressing the big point surrounding the difficulties in getting at the facts.

Facts are at times guesses. The F in the famous formula, $R \times F = D$, presents the key to an understanding of what happens in a lawsuit. "If there is doubt about what a court, in a law suit, will find were the facts, then there is at least equal doubt about its decision . . . . What is the F? Is it what actually happened. . . . Most emphatically not. At best, it is only what the trial court—the trial judge or jury—thinks happened. What the trial court thinks happened may, however, be hopelessly incorrect." All this is true, but one just can't overlook the many, perhaps a vast majority of the cases where the facts are easily ascertainable, even where disputed. Judge Frank once more exaggerates purposely in order to press his point, but we should not overlook the exaggeration. In saying, however, that courts arrive at the facts mistakenly and in pointing to the many factors that tend to contribute to error, one does service

1. *King v. Shipley*, 3 Doug. Rep. 170.
2. Constitution of Massachusetts: Declaration of Rights. Art. 30 (1780).

to a true appreciation of the legal process in action, but we cannot ignore the cases where mistake of fact is not involved. "Only a soothsayer, a prophet, or a person gifted with clairvoyance, can tell a man what are his enforceable rights arising out of any particular transaction, or against any other person, before a lawsuit with respect to that transaction or that person has arisen." If this were 100 per cent true, then the lawyer should bow out of litigation altogether, but he has an important function in advising and also in presenting facts so that they can be accepted by the court. We can heartily agree that the whole subject is important, since about 95 per cent of the cases are not appealed, but may it not be that in most of those cases in which the trial court is the court of last resort, the facts have been rightly found and the law correctly applied?

Judge Frank's views about errors in arriving at facts in the law sound, at times, as convincing as the scientist who would conclude that since *A* has pneumonia, *B* cancer and *C* polio, there are no healthy individuals. If we understand that the healthy results of the law do exist and that facts and rules are satisfactorily found and applied without "legal magic", then we can turn the microscope to a study of legal disease, but only if our realism permits us to see the whole picture and not an exaggerated overemphasis upon what is magnified by legal microscopy.

With that warning in mind, we can follow Judge Frank through his able discussion of difficulties attendant upon our present system of dispensing justice. He finds fault with our adversary method in litigation in that it tends to obscure and even block the uncovering of evidence. He commends the approach of such agencies as the SEC, with which he had personal experience, and he recommends the creation of a governmental non-court fact-finder. He would abolish the third degree and he would have trained psychologists size up witnesses. He feels that procedural reformers to date have not gone far enough in that they have paid too little attention to the difficulties in the ascertainment of facts.

There is a most significant and far-reaching chapter on legal education in which Judge Frank urges the creation of lawyer-schools instead of our existing law schools; with a study of law in action in the courts, before administrative bodies and in law offices deemed as much a part of legal education as the study of cases and legal theory. He claims that the student does not study cases in the case method, but only upper-court opinions. An *argumentum ad hominem* against Langdell spoils an otherwise sound approach.

The judge should be specially trained, a training which should begin in law school and not when he dons the robe—if ever he does, and as to that Judge Frank believes that we should do away with the formality of what he calls "The Cult of the Robe".

Interesting chapters are devoted to: *"Stare Decisis"* and the clinging to precedent only when it is shown that there was reliance and change of position as a result of the precedent; the failure of codifications to accomplish the desired ends, the importance of judicial councils and the idea of court reviews of its own work as advocated by Lobingier; the difficulties of legislation and judicial interpretation and the constitutional "merry-go-round"; the increasingly important studies of legal reasoning, especially those which are in accord with the thesis of the author in appreciating the difficulties in arriving at the facts; a criticism of the "anthropological approach", which holds that there is a law for each custom; a survey of natural law theories and their current revival with considerable praise for some of the American neo-natural law writers; the psychology of litigants, a theme he hopes to develop further; "The Unblindfolding of Justice" through individualizing decisions; a restrained search for a midground between extreme individualism (nominalism) as against extreme philosophical realism (classicism); and a reiteration of the general thesis in a discussion of "Justice and the Emotions", in which he develops the idea that we cannot and should not get away from the fact that government must perforce be a government of men. These are but samples of stimulating discussions that abound in these pages.

Judge Frank concludes with suggestions for further study by all concerned with the questioning of legal axioms that results from his "Non-Euclidean legal thinking." He warns that these are but tentative and they will need much thinking by lawyers and nonlawyers alike to attain salutary results. He is "an improvist, not a perfectionist" and, as such, he presents a challenge to clear, straightforward legal thinking that cannot fail to be productive of much good for our legal system.

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THE DEVELOPMENT OF INTERNATIONAL LAW

Louis B. Sohn • Editor-in-Charge

American Redraft of the Covenant on Human Rights

■ In the light of comments obtained in consultations and conferences throughout the country and at a special meeting of some 150 organizations held at Washington on November 8, 1949, the Department of State prepared a new draft of the Covenant on Human Rights which was forwarded to the United Nations in December, 1949, and made public on January 3, 1950.

While this new draft presents in some respects a marked improvement over previous drafts, some of its positions have not been changed sufficiently to meet the objections raised in the American Bar Association, and a few provisions and omissions may even be considered as retrogressive.

Federal Countries Present Problem

The most fundamental change has been made in the provision concerning the enforcement of the Covenant in federal countries (Article 24). The original draft of the Commission (U.N. Doc. E/800) provided that the obligations of a federal government will be the same as those of other nations "with respect to any articles of this Covenant which the Federal Government regards as wholly or in part appropriate for federal action", and that, on the other hand, it shall bring to the notice of the appropriate authorities of the constituent states, with a favorable recommendation, those articles which it "regards appropriate under its constitutional system, in whole or in part, for action by the constituent states." An early American amendment to this provision added a reference to the "constitutional system" in the first part of this Article to make the two parts uniform in this respect. This change did not, however, meet the main objection raised against this provision, namely that it leaves the decision whether a question is suitable for federal or state action entirely to the discretion of the Federal Government. In particular, fears were expressed that all decisions in this field will be made by the executive branch of the Government which in the past has often shown a tendency to enlarge the field of federal action at the expense of state rights. The new draft gets around this difficulty by stipulating that the division between federal and state matters shall be "determined in accordance with constitutional processes" rather than by the Federal Government. The phrase "constitutional processes" is broad enough to include legislative and judicial determination in addition to executive decision. On the other hand, this phrase is so general that each nation which ratifies the Covenant would have to determine in a more precise manner how the decision would be made in each particular case. There are at least two methods by which this may be accomplished. For example, the Senate when giving its consent to ratification may at the same time adopt a resolution specifying which provisions of the Covenant are suitable for federal action and which should be referred to states. The other possible solution might be to adopt the Canadian system of consultations between federal and state authorities on constitutional questions and to adopt legislation requiring the Federal Government to consult with state governors and to submit the governors' replies to Congress together with the Administration's own opinion on the proper division of responsibilities. Thus the Congress would have before it both points of view and would be able to make an objective decision on the subject. If there were a doubt about the constitutional validity of the congressional resolution settling the matter, the question could be brought before the Supreme Court either directly by one of the states or on appeal from a lower court. One might regret in this particular instance that the Supreme Court does not render advisory opinions on request of Congress with respect to the constitutionality of pending legislation, as the existing procedures allow only an *ex post facto* judicial determination.

Enabling Legislation Should Come First

While the Covenant will probably come first before the Senate as a treaty requiring ratification, action on it by the whole Congress may in any case be necessary in view of Article 2 of the Covenant which requires that each ratifying nation adopt within reasonable time such legislative and other measures as may be necessary to give effect to the rights defined in the Covenant. While this obligation is incumbent only on nations that do not already possess adequate legislation on the subject, it may be assumed that at least in some respects the protection given to individuals by the Covenant is bound to exceed the protection resulting from federal legislation now in force, even in areas that are unquestionably under federal jurisdiction. In fringe areas, *i.e.*, where it may be contended that federal action would infringe upon states' rights, federal legislation is probably even more deficient, but its enactment would be contingent upon a solution of the problems of jurisdiction as outlined in the previous paragraph. It is doubtful

whether such legislation would fare better in Congress than the present attempts to push through President Truman's civil-rights program, especially as there would be an equal threat of a Senate filibuster.

In consequence, it seems very important to ascertain in advance of the ratification of the Covenant which parts of it would actually require additional implementing legislation. The Covenant should not be ratified as long as there is no assurance that the necessary legislation will be enacted "within a reasonable time", as required by Article 2. Otherwise, the United States may find itself in a position similar to that of Canada, which ratified certain labor conventions but was not able to implement them when the legislation enacted for that purpose was declared unconstitutional. It might be regretted that the new American draft did not incorporate the British proposal that the instrument of ratification must be accompanied by a statement that full and complete effect has been given to the provisions of the Covenant in the internal law of the ratifying state. But even in the absence of such a provision it would be wiser to obtain the necessary legislation prior to ratification, thus making certain that the United States will be able to fulfill its obligations under the Covenant.

More Beneficial Laws Raise Question in Some Nations

Besides the question of American law falling short of the Covenant, there is the question of what happens when American law is in advance of the Covenant, in particular where certain rights recognized by our Constitution in the broadest possible terms have been circumscribed in the Covenant by various exceptions or by ambiguous language. The big issue here is whether the broad American rules can be contaminated by the limitations introduced in the Covenant, thus depriving our citizens of the rights now possessed. The United Nations draft contained originally a provision that "nothing in this Covenant may be construed as limiting or derogating from any of the rights and freedoms which may be guaranteed to all under the laws of any Contracting State" (Article 22). Surprisingly, the new American draft omits this provision as "vague, unnecessary and open to abuse".

One may agree that the original provision was vague in the sense that it could have been drafted better to make it unequivocally clear that an individual who alleges that his rights have been curtailed may invoke before proper national authorities either the Covenant or any other prior (or later) national law, whichever is more beneficial to him. For instance, it might be possible to adopt the formula approved by the Senate of the United States on January 25, 1950, in connection with the proposed Equal Rights Amendment to our Constitution—"the provisions of this article [Covenant] shall not be construed to impair any rights, benefits, or exemptions, now or hereafter conferred by law upon persons of the female sex [upon citizens of the Contracting Parties]." It is doubtful whether such a provision could be abused so long as it could be invoked only in derogation of a less beneficial law and not for the purpose of limiting the application of a law considered by the individual as giving him more protection than the Covenant.

It is even more difficult to agree that this provision is unnecessary. It would be unnecessary only if it could be proved that in all countries likely to ratify the Covenant, the Covenant goes beyond the legislation there prevailing and that its every provision is more beneficial to the citizens of those nations than the local legislation. That is not true certainly in the United States and is probably also untrue in all the other countries supporting the Covenant. It is not necessary, on the other hand, to consider the possibility that the Covenant could give a larger amount of rights to citizens of some other countries if these countries are not going to ratify the Covenant anyway. Thus we are confronted only with the question whether the Covenant would give sufficient protection against retrogression in the field of human rights without a special clause disallowing such interpretation of its provisions.

Let's assume that the Covenant has been ratified in the United States and that its provisions have been incorporated into American law by special legislation. A legislative provision cannot, of course, derogate from the Constitution, but it would automatically abrogate any contrary provisions contained in previous legislative acts or administrative regulations, or in those judicial decisions which go beyond mere interpretation of the Constitution. It might be possible to insert in the enabling legislation itself a proviso maintaining in force all legislative and other measures that are more favorable to the protection of civil rights than the Covenant, but a refusal on the part of the legislature to insert such a measure would entirely jeopardize the status of civil rights acquired by the efforts of many generations. If a protective provision is included in the Covenant itself, its beneficent influence would prevail equally in all the ratifying nations. It would also make impossible raising objections to the Covenant based on allegation that its adoption may result in a deterioration of national standards of protection.

"Make Haste Slowly" on Implementation

When an agreement is reached upon both the content of the Covenant and the measures necessary to put it into effect, there will still remain the problem of implementation. The new American proposals reflect in this respect quite clearly the cautious position taken by the American Bar Association. Only nations that are parties to the Covenant will be able to initiate the procedure. This provision ensures complete reciprocity, as a nation accused of a violation may bring similar charges against the accusing nation, if circumstances warrant it. On the other hand, nations not bound by the Covenant

will not have an opportunity to harass the parties to the Covenant. In addition, this provision prevents individuals and private organizations from bringing accusations against nations before the forum provided by the Covenant. This forum is a limited forum also in another respect, namely it is not a court empowered to issue binding judgment but only a temporary committee of five, established especially for each case, which can only render a report on its findings of fact. Only if all nations concerned so desire can the case be submitted to the International Court of Justice for decision.

The committee would be elected in each case by majority vote of nations, parties to the Covenant, thus avoiding reference to the General Assembly of the United Nations in which nations not parties to the Covenant might have influenced the election. The selection of the members of a committee may be made only from a panel previously nominated by nations parties to the Covenant, each nation being entitled to nominate four members of the panel. The members of the committee serve in their personal capacity and not as national representatives, but as far as possible each special committee should include nationals of the countries concerned in the case brought before that committee. The proceedings of the committees are to be held in closed sessions, and they are obliged to give a hearing to all nations concerned. If a legal question shall arise in a committee it may ask the United Nations Commission on Human Rights to request the International Court of Justice for an advisory opinion.

While a committee can make findings of fact, the American proposal does not seem to give it the right to make recommendations. If a committee finds that in the matter before it domestic judicial and administrative remedies have not been exhausted, it may not investigate further but shall limit itself to this finding.

The proposals outlined above are much weaker than any other current proposals (by Australia, France and India), and they fall short of the provisions inserted in several minority treaties after World War I. But this limitation might assist in obtaining ratification from several countries that are willing to conform to international standards of human rights protection but balk at the idea of outside interference in essentially domestic matters. If this first experiment in international legislation on human rights succeeds, national susceptibilities and fears may be allayed sufficiently to allow some further progress in the measures of implementation. Until such more propitious time arrives, the better policy seems to be to hasten slowly.

Disability Benefits Programs

(Continued from page 194)

now strong pressures to make unemployment benefits adequate for the needs of the unemployed without regard to any test to determine entitlement to benefits in excess of the basic floor of security. While it is clear that the level of the floor must rise with rising costs of living, there ought to be careful review of the underlying original concept before we abandon it and go all out for substantial income maintenance to be provided entirely by government. The resulting dependence of individual citizens on government bureaucracy under a program to provide income maintenance out of taxation for all, regardless of need, would verge on the political domination of a total state. Labor organizations, perhaps even more than the rest of Americans, should remember the bait that Bismarck used. None of us should willingly transfer to government those social responsibilities that we ourselves can adequately meet.

Similarly, federal old-age retirement pensions were established to provide a floor of security financed by pay roll taxes. Now we are being urged to provide, not through insurance but out of tax revenues, retirement pensions adequate for needs, without any needs test.

Income loss due to accidental disability or sickness is a hazard that clearly is insurable. There is no need to provide that type of protection out of tax-supported public funds. Whether the accident or illness is occupational or nonoccupational, there are valid data on which group coverages can be rated and insured.

Only through the skills and ingenuity of free men and women can new inventions and new techniques be developed. Government itself can never make that kind of progress.

A society like ours, which cherishes freedom, which measures advances for all its people in truly Gargantuan dimensions that most other countries can not even comprehend, much less emulate, would be ill advised to sacrifice these values for the even level of mediocrity that exists under other governmental systems. Those who live under such conditions live lives that to us are unattractive and uninspiring.

History is ever an unfinished book. Yesterday is gone. Today is vanishing. Tomorrow is just over the horizon. Can our well-being gleam as brightly in tomorrow's world as it did in yesterday's? New times, new conditions, new opportunities challenge us.

Department of Legislation

Harry W. Jones, Editor-in-Charge

■ The author of this article, Beryl Harold Levy of the New York Bar, is a practicing lawyer with wide scholarly interests. He is the author of *Cardozo and Frontiers of Legal Thinking* (1938) and *Our Constitution: Tool or Testament* (1941). Mr. Levy was chairman of the Subcommittee of the Association of the Bar of the City of New York which, during 1948-49, studied the problem of congressional "oversight". The subcommittee's report, as revised and approved by the full Administrative Law Committee, appears in the January, 1950, issue of the Association's publication, *The Record*. Mr. Levy touches in this article on several matters not covered in the Association's report and states expressly that "the present summary is one for which I must assume sole responsibility".

Congressional Oversight of Administrative Agencies

By Beryl Harold Levy

■ Last year a subcommittee of the Administrative Law Committee of the Association of the Bar of the City of New York initiated an analysis of congressional oversight of administrative agencies. The Editor-in-Charge of this department of the JOURNAL has asked me to attempt a brief summary of the essential principles formulated by the subcommittee, in the belief that it would be useful to have our work "given the wider professional currency which would attend publication of a summary statement in the Department of Legislation".

I am happy to accept this invitation, all the more so as I am keenly conscious that our modest start can only break open the surface of the problem and that further thought among bar associations is needed to contribute to a sound solution. The subject is peculiarly one for vigorous insistence on standards to be clearly formulated and conscientiously maintained. It is not so long ago that administrative agencies had to struggle for their right to exercise the independent responsibility delegated to them. Respected agency status is now sufficiently established, however. Vigorous exercise of appropriate oversight appears to be both safe and proper. Congressional alertness to this need is expressed in Section 136 of the Legislative Reorganization Act of 1946 under the rubric, "legislative oversight by standing committees".

Congressional Oversight Function and Agency Responsibility

In creating an administrative agency, the legislature premises a divided responsibility: *First*, that the agency has autonomous responsibility for making decisions within the policy standards and with the procedural machinery fixed by the statute, subject to judicial review to assure fidelity to the statutory requirements; *Second*, that the legislature retains basic responsibility for amending the statute, if need is revealed for a change in the policy standards or procedural machinery.

Through legislative "watchfulness" this need for change may be more effectively conveyed by emphasis on the continuous obligation to study and assess the operations of an agency. The statute does not alter the respective duties of the legislature or of the agency. It remains the essential duty of the Congress to establish and amend an act, while the essential duty of the agency is to administer the act within the budgetary appropriation. Generally, the lines between these respective responsibilities should not be crossed from either side. With limited exceptions, the attention of the legislature should be directed essentially to the need, through further legislation, for altering the policy standards, procedural machinery or budgetary allotment. In administering the act, the agency is to be free from legislative "interference".

The problem is a delicate one and cannot be solved by rule-making or attempts at rigid control. Essentially the solution must come through a growing discipline of discernment and self-restraint, a professional sense of propriety on the part of legislator and administrator, each respecting the other's province. We undertook to formulate certain caveats with respect to the conduct of congressional committees in commenting on (a) pending cases, (b) decided cases, (c) the agency's internal organization and procedural regulations and (d) proposed substantive regulations promulgated by the agency.

(a) It is clear that legislative committees ought not suggest how particular issues in *pending* cases should be decided. We found lip-service to this "salutary rule" of noninterference in both the majority and minority reports of the Taft-Hartley watchdog committee. Both of them, however, undertook to state their interpretation of the law before the issues had been decided by the Board. The majority also intruded its views on how a particular case should be processed in the Board.

(b) With respect to *decided* cases, the test appears to be: Is the criticism of the decision genuinely a phase of the committee's consideration of a statutory change? A committee's criticism which is designed to influence future agency action under the existing statute, as by seeking to limit a trend of doctrine, would be patently inappropriate.

(c) Suggestions for *internal changes of procedure*, based on the broader perspective of a standing committee familiar with many agencies, would

be in order. To require that such suggestions be embodied only in recommended legislation would in practice mean that they could not be made effective at all.

(d) On occasion an agency invites comment from all sources on a *proposed regulation* within areas confided to the agency's discretion by the statute. A proposed stabilizing regulation announced by the SEC would be an example, where comment by the committee or its individual members is not objectionable.

Devices for Effective Liaison Deserve Close Study

No report on a subject of this nature would be complete in the second half of the twentieth century without a functional and institutional analysis of the means of interrelation between Congress and the agencies and how they operate to carry out the desired objective. No contemporary legal analysis can ignore the broadening impact of sociological and realist jurisprudence, with its insistence on attention to the way in which our "law-jobs" are actually done and the social ramifications of these "law-ways". (The quoted terms are borrowed from Llewellyn.) Thus we also analyzed the existing shuttlecocks of liaison:

(a) reports by the agency;

(b) investigative hearings by standing, appropriations, "watchdog" and other special committees (here we pay our respects to the extraordinary "klieg-light" type of investigation and the special problems arising upon confirmation of appointments);

(c) committee reports;

(d) informal contacts of the committee or of individual members of Congress.

The space allotted here does not permit a résumé of our conclusions as to the functioning of these coordinating devices. That is particularly unfortunate with respect to our discussion of the joint "watchdog" committees which themselves bear watching and which Professor Jones has written about so thoughtfully here. A new development, as found in the Atomic Energy Control Act, has serious portents: allowing the Congress to veto certain agency decisions by taking action within a specified period. In areas where public anxiety is profound, Congress appears to be not quite ready to release the string and let the top spin.

The realistic political phases of the problem, in terms of the pressures on and by legislators-as-politicians, require much more attention, no less with an eye to the needed shock-absorption rôle of politicians in a democratic polity than to the punctilios to be heeded. The Hoover Commission's task force report suggests that members of Congress should refer inquiries and complaints about an agency to the appropriate legislative committee charged with oversight. The committee could investigate and the Congressman would be shielded from suspicion of improper influence inherent in direct approaches for constituents. We concurred in this suggestion. Where the Congressman feels he must give evidence of serving his constituent by any proper request to the agency, it is advisable to develop a custom of having the request made in writing so that it can be dealt with openly without embarrassment to the agency.

Much could be said, also, about the restraints and ingenuousness expected of administrators. They must not themselves, because of strong convictions, extend or whittle away the evident meaning of a statute or abuse adjudicative devices so as to defy appeal. These phases of the problem were not discussed in our initial report, in which we concentrated on the legislative aspect.

We concluded that vigilant and conscientious exercise of oversight is much to be desired. Our analysis suggested the advisability of erecting self-imposed restraints such as those discussed. The means of interrelation which exist were found to be adequate to improve administrative functioning. They can be more efficiently utilized with concomitant care to avoid abuses.

The issues of judicial review have occupied the attention of the Bar to such an extent that our instant problem has been left largely unexplored. It appears to be of basic importance in a statute-oriented generation of lawyers. It presents the challenge of another instance of a recurrent problem of democratic government in a complex economy: the suitable accommodation of popular control and flexible administrative expertness.

Let me not be misunderstood as saying there are no bad laws, or that grievances may not arise for the redress of which no legal provisions have been made. I mean to say no such thing. But I do mean to say that although bad laws, if they exist, should be repealed as soon as possible, still, while they continue in force, for the sake of example, they should be religiously observed.

—Abraham Lincoln in an address at Springfield, Illinois, January 27, 1837.

Tax Notes

■ Prepared by Committee on Publications, Section of Taxation, Joseph S. Platt, Committee Chairman, Harry K. Mansfield, Vice Chairman.

Decedents' Estates
Some Points To Remember

■ 1. *The decedent's final return.* The death of a taxpayer terminates one taxable entity and creates a new one. The executor must file a final return for the decedent covering the period from the beginning of his current taxable year, normally January 1, to the date of death. Assuming that the decedent was on a calendar year basis this return is due on March 15 of the year following the year of death. The decedent has presumably been paying his taxes currently on an estimated basis reflecting his expected income for the entire year. These estimated payments, which cease at death, will frequently give rise to a refund when the return is filed, since the actual tax on the short period income (to date of death) is likely to be less than the pro rata portion of the estimated tax for the entire year which the decedent has paid.

If the decedent is survived by a spouse, who does not remarry within the year, the final return may be a joint one giving both the estate and the spouse the benefit of the split income rule. The joint return will include the decedent's income to date of death and the spouse's income for the entire year. Some question may be raised as to the authority of an executor to execute a joint return, at least where the total joint tax liability is in excess of the separate return tax on the decedent's own income for the short period. This is a point which should be borne in mind in the drafting of wills. In the absence of specific authorization the executor may find it advisable to insist that the surviving spouse secure the estate against any deficiency resulting from an understatement of the spouse's income. In any event the estate will presumably pay only its pro rata share of the tax shown on the return.

2. *The estate's first return.* The estate must report all income received after the decedent's death. As a new taxable entity it may select its own taxable year, calendar or fiscal, without regard to the decedent's year. If the executor does not elect a fiscal year (ending on some month other than December), he will be on the calendar year basis. His first return for the estate will be due on March 15 of the year following the year of death and will cover the period between the date of death and December 31.

The executor should consider adopting a year ending six months or so after the decedent's death. The effect will be to create a short taxable year in which estate income will be taxed at lower rates. For example if the decedent dies in January, the executor might elect a year ending on June 30 or July 31. Net income received during this six months' period will be taxed as though reported in a full-year return and, since it will be only about half as much as a full year's income, it will be taxed at lower rates. The adoption of a fiscal year by a new taxpayer is a matter of bookkeeping. The important thing is to make a definite choice and establish the year before its close in the taxpayer's books and records. "No fiscal year will . . . be recognized unless before its close it was definitely established as an accounting period by the taxpayer and the books of such taxpayer were kept in accordance therewith." Regulations 111, Sec. 29.41-4. In the case of an estate it may be feasible to fortify the election by an application or other timely filing in the probate court.

Incidentally the closing of the estate may produce another low rate taxable year. If the final distribution takes place some months before the end of the estate's year, whether calendar or fiscal, the final return will again reflect considerably less than a full year's income. And this lesser income, if taxed to the estate, will again be subject to a lower tax rate. (As to the treatment of income in the year of distribution, see Section 162.)

3. *The estate's income and deductions.* In the estate returns the executor will report income from the properties under his administration—interest, dividends, capital gains and losses—and current income from the decedent's business if continued in operation. He will report rents from real estate only if the property is under his control, by authority of the will or of state law. Otherwise any rents collected by him will be for the account of the heirs or devisees and should be reported by them. He will also report "income in respect of" the decedent which is taxable to the estate under Section 126. This includes among other things fees and other types of compensation received by the estate for services rendered by the decedent during his lifetime. Section 126 items ordinarily represent claims in existence at the decedent's death, includable at fair value in the estate tax return. To compensate in part for this double tax, Section 126

allows the estate an income tax deduction equal to the amount of the estate tax attributable to such items.

Under Section 113 (a) (5) the basis to the estate (and its distributees) for computing gains and losses in sale transactions is the value of the property at the decedent's death (or one year after death if the optional valuation date is elected for estate tax under Section 811 (j)). As a practical matter this means the value used for estate tax purposes, or for state inheritance tax if no federal return was filed. As to property which is likely to be sold, therefore, a high valuation is often more favorable tax-wise than a low one. The higher basis reduces the taxable gain realized when the property is sold or eliminates it entirely. This matter of basis is particularly important in connection with promissory notes and other money claims which may eventually be collected in full. If a note for $1000 is valued for estate tax at $700, the extra $300 subsequently collected from the maker will be ordinary income to the holder. This is because the collection of a note is not a "sale or exchange" and therefore does not qualify for capital gain treatment. This taxable "profit" is avoided by having the note appraised at face, $1000, at the expense, of course, of some additional estate or inheritance tax.

On the deduction side there is a class of items which may be deducted in either the estate or the income tax return, but not in both. These include costs and expenses attributable to the current management, conservation and maintenance of property in the estate—attorneys' and accountants' fees, commissions, etc. These are part of the costs of administration and deductible as such under Section 812 (b) of the estate tax law. They also represent non-business expenses, deductible for income tax under Section 23 (a) (2). The executor can take his choice. But he must be sure to comply with Section 162 (e) if he decides to use the deduction in the income tax return. He must file a statement that the items have not been claimed or allowed under Section 812 (b) and a waiver of his right to deduct them at any time for estate tax purposes. If the statement is not filed the deduction may be lost.

The major deduction peculiar to estates, in common with trusts, relates to income distributable or distributed to the beneficiaries. The incidence of the tax in this area depends upon the application of Section 162. This problem will be considered in a later note.

Practising lawyer's guide to the current LAW MAGAZINES

Calvin P. Sawyier • Editor-in-Charge

FEDERAL COURTS—PROCEDURE: Two articles in the Summer, 1949, issue of *Wyoming Law Journal* (Vol. 3—No. 4) present a general survey of the work of the Judicial Conference Committee on Pre-trial Procedure. Will Shafroth, who is with the Administrative Office of the United States Courts and who acts as secretary to the Committee, sketches the "Pre-trial Techniques of Federal Judges" (pages 185-196) by reference to the actual practice of individual federal judges. Professor Edson R. Sunderland, consultant to the Committee, discusses the general purposes of the pre-trial conference in "Procedure for Pre-trial Conferences in the Federal Courts" (pages 197-203). Together these two articles enable the lawyer to get a vicarious "inside" look at this important phase of proceeding in the federal courts. (Address: Wyoming Law Journal, Casper, Wyo.; price for a single copy: not stated.)

FEDERAL TAXATION—*"Fertility Tables—A Method To Resolve the Tax Valuation of Property Transfer Containing Birth Contingencies"*: This article in the *Nebraska Law Review*, by Joe R. Seacrest, (Vol. 29; pages 17-59) will be of interest, and possibly of use, to all tax lawyers. As long as contingencies of birth are made part of tax law, judicially-acceptable means of ascertaining the value of such contingencies must be sought. For the taxpayer this may be particularly decisive, as his is the burden of overcoming whatever answer the Commissioner may assert. The present article may ultimately help to provide a useful weapon in meeting the taxpayer's burden of valuing interests which heretofore it has been considered impossible to value by any recognized methods. (Address: Nebraska Law Review, University of Nebraska, Lincoln, Neb.; price for a single copy: $1.00.)

Editor's Note

Members of the Association who wish to obtain any article referred to should make a prompt request to the address given with remittance of the price stated. If copies are unobtainable from the publisher, the *Journal* will endeavor to supply, at a price to cover cost plus handling and postage, a planograph or other copy of a current article.

FEDERAL TAXATION—*"Relief from Delinquency Penalties: The Internal Revenue Code":* In the *University of Pennsylvania Law Review* (Vol. 98; pages 183-202) Herbert W. Reisner takes up a matter which is of concern to lawyers whenever they give an opinion on taxability. Delinquency issues are secondary issues in most cases, but the author warns the practitioner not to neglect to offer all the evidence relevant to relief from such penalties. The anomalous difference in the possibility of obtaining relief when the taxpayer fails to file a gift or estate tax return on the one hand, and when the taxpayer fails to file an income tax return on the other hand, is noted by the author. The body of the article is an attempt to outline the burden of proof necessary to get relief, under the headings of: delinquency caused by the taxpayer, delinquencies caused by agents, and delinquencies caused by advisers (accountants and lawyers). (Address: University of Pennsylvania Law Review, 3400 Chestnut Street, Philadelphia, Pa.; price for a single copy: $1.00.)

INTERSTATE COMMERCE—RAILROAD RATES—*"Group Rates: A Questionable Feature of the Railroad Rate Structure":* A note in the *University of Pennsylvania Law Review* (Vol. 98; page 204) considers the railroad rate-making practice of treating variously located producers or several localities as if they were all situated at one point so that freight charges for all within the "rate group" are identical. The topic is one of current interest because it is analogous to basing point pricing systems and because an appeal to the Supreme Court of the United States has been filed which challenges the validity of group rates. *Lynchburg Traffic Bureau* v. *U. S.*, 84 F. Supp. 1012, appeal filed October 4, 1949. (Address: University of Pennsylvania Law Review, 3400 Chestnut Street, Philadelphia, Pa.; price for a single copy: $1.00.)

RESTRAINTS OF TRADE—Section 3 of the Clayton Act—*"Potential Impairment of Competition—The Impact of* Standard Oil Company of California *v.* United States *on the Standard of Legality Under the Clayton Act":* A full length treatment of the recent Supreme Court decision, which injects anti-trust considerations deep into the sphere of internal corporate organizational policy, by Louis B. Schwartz, is published in the *University of Pennsylvania Law Review* (Vol. 98; pages 10-40). The author suggests that the Court has rightly drawn a distinction under Section 3 of the Sherman Act between those corporations which have a powerful, even though not a monopolistic, position in the trade, and those which are small businesses or newcomers. As to the former, exclusive supply contracts are, in effect, illegal *per se*, especially where all the "leaders" of the particular industry employ such contracts; but the latter may properly be allowed the use of this business device. This, says the author, preserves the legislative intent to have the Clayton Act perform a function not covered by the "unreasonable" restraints proscribed by the Sherman Act, gives effect to the qualifying clause of Section 3 of the Clayton Act, and falls into the rationale of decisions going back to the case of *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U. S. 346 (1922). (Address: University of Pennsylvania Law Review, 3400 Chestnut Street, Philadelphia, Pa.; price for a single copy: $1.00.)

TORTS—NEGLIGENCE—*"The Role of Administrative Safety Measures in Negligence Actions":* In the *Texas Law Review* (Vol. 28; pages 143-167) Professor Clarence Morris discusses the effect which industrial safety standards promulgated by an administrative agency have on damage suits. The problem is taken up in relation to the two-fold manner in which it may be presented to the courts: (1) Is violation of an administrative safety measure negligence as a matter of law? and (2) Is compliance with administrative safety requirements due care as a matter of law? The author warns against taking administrative nonaction on a particular matter as the equivalent of affirmative and express administrative rules, and concludes that considered administrative judgment should be deemed "presumptively acceptable" in court on the issue of due care. (Address: Texas Law Review, University Station, Austin 12, Texas; price for a single copy: $1.00.)

WILLS—*"The Expectant Legatee":* In this comment in the *Harvard Law Review* (Vol. 63—No. 1; pages 108-111), Professor Austin W. Scott takes up the problem of the person who, about to become a legatee, is prevented from becoming such by the fraud or violence practiced on the testator by the one who stands to be the beneficiary under the state of affairs existing at the time such fraud or violence was practiced. Professor Scott concludes that, as held in *Latham* v. *Father Divine*, 299 N. Y. 22, 85 N. E. (2d) 168 (1949), the property is properly held on constructive trust by the fraudulent party for the benefit of the expectant legatee. (Address: Harvard Law Review, Gannett House, Cambridge, Mass.; price for a single copy: $1.00.)

BAR ACTIVITIES

Paul B. DeWitt • Editor-in-Charge

▪ Tentative drafts of parts of a federal income tax statute which the American Law Institute is currently preparing were discussed at a meeting of taxation practitioners in Washington, D. C., on January 18, 19 and 20. Subjects covered included corporate distributions, corporate formations, reorganizations and liquidation of subsidiaries and accounting. The over-all objective of the Institute's income tax project is the improvement of the technical provisions of the present law.

Participating in the meeting of the Income Tax Advisory Group were Charles Barnard of San Francisco, Kenneth Bergen of Boston, John Boland of Washington, D. C., Howard Burns of Cleveland, Morton P. Fisher, of Baltimore, Edgar J. Goodrich of Washington, D. C., Allan H. W. Higgins of Boston, Alex Hamburg of New York City, James S. Y. Ivins of Washington, D. C., Albert E. James of Washington, D. C., Mark H. Johnson of New York City, Frank M. Keesling of Los Angeles, Arthur H. Kent of San Francisco, John W. Kern and H. C. Kilpatrick of Washington, D. C., Hayner N. Larson of Minneapolis, Theodore R. Meyer of San Francisco, James A. Moore of Philadelphia, George Maurice Morris of Washington, D. C., Ralph R. Neuhoff of St. Louis, C. R. Peterson of Washington, D. C., Joseph S. Platt of Columbus, Leonard M. Rieser of Chicago, Harry J. Rudick of New York City, Robert A. Schulman of Washington, D. C., Jacob S. Seidman of New York City, Lucien W. Shaw of Palm Springs, Harry Silverson of New York City, William R. Spoffard of Philadelphia, William A. Sutherland of Washington, D. C., Francis H. Uriell of Chicago, Weston Vernon, Jr. of New York City and Robert W. Wales of Chicago.

Stanley S. Surrey of the University of California, and William C. Warren of Columbia University are the Chief and Associate Reporters. Working on particular phases of the project are John M. Maguire of Harvard University, J. Rex Dibble of Loyola School of Law of Los Angeles and Thomas N. Tarleau and Edwin S. Cohen of New York City. Maurice Austin of New York City is the Special Adviser on Matters Pertaining to Accounting. The work of the Reporters and their Special Consultants are under the immediate direction of the Tax Policy Committee consisting of Norris Darrell of New York City, Lawrence E. Green of Boston, Dean Erwin N. Griswold of Harvard University Law School, Robert N. Miller and Randolph E. Paul of Washington, D. C., and Paul G. Rodewald of Pittsburgh. Harrison Tweed of New York City, President of the Institute, and Herbert F. Goodrich of Philadelphia, Director of the Institute, serve ex officio on committees.

The current draft is in such tentative form that it is not yet available for public distribution. As a result of the meeting and future meetings, it will be revised and submitted for general discussion at the Annual Meeting of the Institute in Washington, D. C., on May 18, 19 and 20.

▪ The Board of Governors of the Oregon State Bar have inaugurated the practice of holding their meetings at the various law schools in the state, so that law students will have the opportunity of meeting members of the Board and learning of the work of the association. The October meeting was held at the University of Oregon. At an assembly of the students representative problems which come before the Board were discussed and Lee W. Karr, Secretary, gave an outline of employment opportunities in the state. The meeting was then opened for informal discussion and questions by the students.

▪ A number of state and local bar association journals have in recent months revised their format and cover pages. One of the most successful of these changes is that made by the *Connecticut Bar Journal* which now has a dignified and clean-cut appearance. *Dicta*, the publication of the Denver and Colorado Bar Associations, has adopted a modern format, as has *The Bulletin* of the Cuyahoga County Bar Association. Beginning with the January number, the *Cleveland Bar Association Journal* features on its cover reproductions of Sir Leslie Ward's Spy prints.

The Law Society's *Gazette* is now printed on more attractive stock and a lessening of the paper shortage apparently has permitted the *Gazette* to resume publication of all its former departments and some new ones. There is a lively letter column in which in recent numbers there has been controversy over the desirability of gowns for justices' clerks. One correspondent writes, "The clerk, by reason of his very office, takes a not inconsiderable share in what I may call the mechanical side of the work in court: he reads the charge, informs the defendant, in appropriate cases, of his right to trial by jury, calls upon him to plead, and so on. As a result, although he is as a rule seated below the Bench, there is sometimes some confusion in the minds of those unused to court practice as to his function, and a tendency to regard him as the Court itself.

"If he, alone in Court, were to be gowned, and presumably also distinguished by bands, his appearance

of importance would be increased.

"He is, after all, the servant of his justices, and so long as they are content to appear without robes, he should not aspire to the pretensions of a gown."

■ A regional meeting of bar association secretaries was sponsored in January by the Columbus Bar Association. Subjects discussed were membership participation in association activities, publications, public relations, mechanics of association operation, and arrangements for annual meetings. The guests were entertained at a cocktail party by the Ohio State and Columbus Bar Associations. The general chairman of the meeting was Milton Bachman, Executive Secretary of the Michigan State Bar Association.

Samuel H. PLATCOW

■ The seventy-fourth annual meeting of the State Bar Association of Connecticut was held at Hartford in October. This is the first annual meeting after a full year of operation of the new constitution patterned very closely on the constitution of the American Bar Association. It was also the end of the first year with a central office in the charge of a full-time executive secretary. The advantages of these steps were clearly apparent from the widened scope of the Association's activities and influence as revealed in the reports presented.

The Secretary's report revealed an all-time high in an active membership of 1477. This shows an increase in the last decade from about 30 per cent of the Connecticut lawyers in the Association to over 60 per cent.

Nineteen of the two-dozen-odd committees reported. Most of the reports contained either specific recommendations for action or a narrative of action already carried out. Four of the six sections presented reports.

The meeting of the Assembly was followed by the meeting of the Board of Delegates. In addition to passing finally on the matters considered by the Assembly, the Board adopted new sets of by-laws for the Association and for itself, implementing the new constitution adopted in June, 1948.

The meeting concluded with the annual dinner at which Attorney General J. Howard McGrath was the guest of honor.

The newly elected officers are Samuel H. Platcow of New Haven, President; H. Meade Alcorn, Jr. of Suffield, First Vice President; William W. Gager of Waterbury, Second Vice President; Herbert S. MacDonald, Secretary and Treasurer. John I. Ely of New Haven was reappointed Assistant Secretary and Treasurer. A wrist watch was presented to Charles W. Pettengill of Greenwich, retiring President.

■ The Committee on Continuing Legal Education of the American Law Institute, collaborating with the American Bar Association, reports the following activities during the past two months.

Charles W. Joiner of the University of Michigan Law School, has become Director of the Committee for the Mid-Western Area. Professor Joiner will devote himself to the creation of state-wide organizations within bar associations for conducting programs on continuing legal education in midwestern states. James E. Brenner of Stanford University Law School, continues as Director for the Western Area, and John E. Mulder continues as Director of the Committee, with headquarters at 133 South 36th Street, Philadelphia 4, Pennsylvania.

The following have been appointed to membership on the Committee:

Representing the American Law Institute

Arch M. Cantrall, Clarksburg, West Virginia

William H. Eckert, Pittsburgh, Pennsylvania

Arthur Larson, Cornell University Law School

Representing the Section on Legal Education of the American Bar Association

Richard Bentley, Chicago

Representing the Junior Bar Conference

Bryce Rea, Jr., Washington, D. C.

Publications of the Committee on important subjects of the law are being sold under a subscription plan, pursuant to which six publications per year may be purchased at an annual fee of ten dollars. The Committee reports that the number of subscribers is increasing at a very rapid rate, subscriptions coming from all over the country. Included in Series One of the subscription plan are:

Legal Problems in Tax Returns, by Thomas P. Glassmoyer and Sherwin T. McDowell

Lifetime and Testamentary Estate Planning, by Harrison Tweed and William Parsons

The Drafting of Partnership Agreements, by John E. Mulder and Marlin M. Volz

Labor Law and Labor Negotiations, by Marcus Manoff

Price Discriminations and Related Problems under the Robinson-Patman Act, by Cyrus Austin

Basic Accounting for Lawyers, by Barton E. Ferst

Scheduled for spring and summer publication are pamphlets on:

Organizational Problems of Small Businesses, by Leonard Sarner

Bankruptcy and Arrangement Proceedings, by Leon Forman

Pre-Trial Practice, by Harry D. Nims

Practice under the Wage and Hour Act, by Charles H. Livengood

Procedure Before the Bureau of Internal Revenue
The Drafting of Corporate Instruments

The Committee on Continuing Legal Education has recently cooperated in the following programs:

One of the most successful legal institutes was conducted in Atlanta on December 8, 1949, at the midwinter meeting of the Georgia Bar Association, with more than 250 lawyers attending. The subjects covered were estate planning for smaller estates and organizational problems of small businesses. The outstanding panel of lecturers included Professor A. J. Casner of Harvard Law School; Allan H. W. Higgins, Boston; William Parsons, New York City; Chester Rohrlich, New York City; Arch M. Cantrall, Clarksburg, West Virginia, and George Craven, Philadelphia. Honorable Herbert F. Goodrich of Philadelphia was the dinner speaker. As a result of the success of the project, the Georgia Bar Association generously contributed $500 to the Committee in furtherance of its project.

A fifteen-lecture course on problems of general practice is currently being conducted in Philadelphia by the Committee on Professional Education of the Philadelphia Bar Association. More than 250 lawyers are enrolled. The subjects and lecturers are:

Legal problems in tax returns, three lectures by Clement J. Clarke, Jr., Fred L. Rosenbloom and Kenneth W. Gemmill, all of Philadelphia; federal procedure and practice, four lectures, by Philip Werner Amram of Washington, D. C., William H. Kirkpatrick of Philadelphia, Charles E. Kenworthey of Pittsburgh and Thomas D. McBride of Philadelphia; family law, three lectures, by Louis B. Schwartz and Nochem S. Winnet, of Philadelphia, and Frederick B. Smillie of Norristown, Pennsylvania; real estate law and practice, five lectures by Morris Wolf of Philadelphia.

A six-lecture course on current problems in taxation is being sponsored by the St. Louis Bar Association. The subjects and lecturers are:

Legal problems in tax returns, by Lewis D. Spencer of Chicago; estate planning by George Craven of Philadelphia and Paul F. Millett of Chicago; forms of business organizations and the tax laws, by Alan C. Gornick of Detroit; income tax problems relating to ownership of real estate and securities by David Richmond of Washington, D. C.; corporate reorganizations and readjustments by Edwin S. Cohen of New York City.

Approximately 130 lawyers were enrolled for an Institute on Organizational Problems of Small Businesses, in Jacksonville, Florida, on December 16, 1949, sponsored by the Jacksonville Bar Association. Speakers were Leonard Sarner, James M. Sutton and Joseph W. Price, III, all of Philadelphia. The Extension Division of the University of Florida cooperated with the Jacksonville Bar Association.

The Lancaster County Bar Association conducted its second successful institute on December 16, 1949, at Lancaster, Pennsylvania. The subject was "Legal Problems in Tax Returns" and the speakers were Thomas P. Glassmoyer and Sherwin T. McDowell of Philadelphia.

Institutes on legal problems in tax returns were also held as follows:

Spokane, Washington, January 21, 1950, by the Spokane Bar Association. Lecturers were Charles F. Osborn of Seattle and Alfred Harsch of the University of Washington Law School, and Douglas Barnes of the Bureau of Internal Revenue.

Tucson and Phoenix, Arizona, January 20 and 21, 1950 by the Arizona State Bar. Speakers were Oliver M. Jamison and Newton T. Russell of Fresno, California.

Tulsa, McAlester, Enid, Oklahoma City and Lawton, Oklahoma, January 31, February 1, 7, 8, and 9, 1950, by the Oklahoma Bar Association.

■ The Akron Bar Association celebrated in January its seventy-fifth anniversary with an all-day program. Speakers at the luncheon meeting were President James M. Hengst of the Ohio State Bar Association and Frank C. Dunbar, Jr., Vice Chairman of the Section on Bar Activities. Discussion from the plaintiff's and defendant's point of view on the subject of "Evaluation of Personal Injury Claims" was a feature of the afternoon program. At the banquet the featured speaker was former Attorney General Charles J. Margiotti of Pennsylvania. James M. Hinton is President of the Akron Bar Association and Marian Brock is the Executive Secretary.

■ The spring program of the Ohio Practicing Law Institute will consist of a Probate Practice Institute dealing with three topics: "Settling Accounts", "Transfers from Decedents' Estates", and "State Taxes on Transfers from Decedents' Estates". The Institute is offered to any local bar association and the speakers are prominent Ohio lawyers, all specialists in probate practice. A syllabus on each of the topics is mailed in advance to each person registering for the Institute and the secretary's office of the State Bar Association assists the local bar association by sending out notices and making arrangements for publicity. Professor Justin H. Folkerth of Ohio State University is Chairman of the Ohio Practicing Law Institute.

■ A course of fourteen lectures on "The Place of Law in Democratic Society," for teachers in the schools of New York City, sponsored by The Association of the Bar of the City of New York, drew an average attendance at each lecture of over 500 teachers. Teachers in the public schools received in-service training credit for attending the course,

which was given by fourteen members of the Association under the direction of a committee whose chairman was former Supreme Court Justice Paxton Blair.

Topics and lecturers were "Federal and State Constitutions", by Herbert Wechsler; "Common Law and Statutes", by Justice Bernard L. Shientag; "Regulations by Administrative Agencies", by Robert M. Benjamin; "Elements of Due Process and Principal Categories of Litigation", by Judge Paxton Blair; "Rights and Duties of Citizens", by Judge Samuel I. Rosenman; "Family Law and Social Welfare", by Justice Hubert T. Delany; "Protection of Property and Personal Rights", by Justice Bernard Botein; "Labor and Management", by Theodore W. Kheel; "Bill of Rights", by Whitney North Seymour; "Taxation", by Randolph E. Paul; "Development of Public Projects and Control of Uses of Land", by Lewis Orgel; "The Trial of Cases and Arts of Counselling," by Judge J. Edward Lumbard, Jr.; "Law Reform", by Justice Henry C. Greenberg, and "Formation of Enlightened Opinion", by Judge Jerome N. Frank.

■ The Committees on Aeronautical Law of the Illinois State and Chicago Bar Associations sponsored in February a clinic on the question of federal as opposed to state control of aviation. John C. Cooper, former vice president of Pan American Airways, was the principal dinner speaker. Mr. Cooper spoke on "International Aviation Law and Its Relationship to Federal and State Legal Problems." Afternoon sessions of the clinic were devoted to panel discussions which considered the following topics: "Safety and Aircraft Operations"; "Application of State Substantive Law to Aircraft in Flight", and "Economic Control of Aviation".

■ The Cuyahoga County Bar Association has held its fourth public employees' testimonial dinner. Five public employees were honored and distinguished service scrolls awarded to them. The awards were made to Mrs. Anna Mae Lahiff, Probation Officer of the Municipal Court; Thomas A. Albertson, Deputy Municipal Court Clerk; George P. Heidt, Deputy County Clerk at Criminal Court; John Ray, Bailiff of Municipal Court; and Ellis V. Rippner, Deputy Probate Court Clerk.

Nominating Petitions for State Delegates

California

■ The undersigned hereby nominate Harry J. McClean of Los Angeles for the office of State Delegate for and from California to be elected in 1950 for a three-year term beginning at the adjournment of the 1950 Annual Meeting:

Gilford G. Rowland of Sacramento;

Leon E. Warmke of Stockton;

Frank C. Lerrigo of Fresno;

Harry M. Conron of Bakersfield;

Eugene Glenn of San Diego;

Raymond T. Sullivan, Jr., of Riverside;

Charles A. Beardsley, Gerald H. Hagar, Liston D. Allen and Cyril W. McClean of Oakland;

William L. Prosser of Berkeley;

Marvin Handler, Tadini Bacigalupi, Samuel B. Stewart, Jr., Charles F. Jonas and Martin J. Dinkelspiel of San Francisco;

Richard K. Gandy of Santa Monica;

Dana Latham, Walter L. Nossaman, Forrest A. Betts, Jerry Giesler, Herbert Freston, Edward S. Shattuck, Gurney E. Newlin and James C. Sheppard of Los Angeles.

Missouri

■ The undersigned hereby nominate Ronald J. Foulis of St. Louis for the office of State Delegate for and from Missouri to be elected in 1950 for a three-year term beginning at the adjournment of the 1950 Annual Meeting:

James A. Finch, Jr., and Allen L. Oliver of Cape Girardeau;

Laurance M. Hyde of Jefferson City;

Rufus Burrus of Independence;

Douglas Stripp, R. L. Hecker, George L. Gisler, Cornelius Roach, Leo B. Parker, Roscoe C. Van Valkenburgh and James T. Britt of Kansas City;

W. Wallace Fry of Mexico;

Forrest M. Hemker, George L. Stemmler, William W. Crowdus, Clarence M. Barksdale, C. Kenneth Thies, Isaac C. Orr, Oscar Habenicht, C. O. Inman, Leo Lyng, Ethan A. H. Shepley, Lon Hocker and Luther Ely Smith of St. Louis;

Warren M. Turner of Springfield.

New York

■ The undersigned hereby nominate Franklin E. Parker, Jr. of New York City to fill the vacancy in the office of State Delegate for and from New York:

Theodore G. Kenefick and Thomas Penney, Jr. of Buffalo;

Arthur E. Sutherland, Jr. of Ithaca;

Harrison Tweed, Whitney North Seymour, H. W. Nichols, Weston Vernon, Jr., K. N. Llewellyn, John W. Davis, Allen Wardwell, E. J. Dimock, Wm. Dean Embree, Orison S. Marden, Glover Johnson, C. C. Burlingham, Otis T. Bradley, Mason H. Bigelow, Bruce Bromley, Paul B. De Witt, Thomas D. Thacher, Samuel Seabury, George Spiegelberg, Robert McC. Marsh, L. Randolph Mason and Timothy N. Pfeiffer of New York City.

North Dakota

■ The undersigned hereby nominate Herbert G. Nilles of Fargo for the office of State Delegate for and from North Dakota to be elected in 1950 for a three-year term beginning at the adjournment of the 1950 Annual Meeting:

Mack V. Traynor, Clyde Duffy and Frederic T. Cuthbert of Devils Lake;

Harvey B. Knudson of Mayville;

Theodore Kellogg and H. A. Mackoff of Dickinson;

Ernest R. Fleck, Charles L. Foster, John A. Zuger, William R. Pearce, George S. Register and Clyde L. Young of Bismarck;

O. B. Burtness, Harold D. Shaft, T. A. Toner, Thomas P. McElroy, Jr., Harold Hager, Thomas L. Degnan, Carlton G. Nelson, O. H. Thormodsgard, C. F. Peterson, Philip R. Bangs and Mabel P. Vaaler of Grand Forks;

John C. Pollock and Adrian O. McLellan of Fargo.

Virginia

■ The undersigned hereby nominate Thomas B. Gay of Richmond for the office of State Delegate for and from Virginia to be elected in 1950 for a three-year term beginning at the adjournment of the 1950 Annual Meeting:

Gardner L. Boothe and John Barton Phillips of Alexandria;

Joseph W. Richmond, C. Armonde Paxson, and Sidney D. Watson of Charlottesville;

Frank W. Rogers, John H. Thornton, Jr., Fred B. Gentry, Sidney F. Parham, Jr., John D. Carr, Leonard G. Muse and George S. Shackelford, Jr., of Roanoke;

Robert B. Tunstall and Leigh D. Williams of Norfolk;

S. H. Williams and Henry M. Sackett, Jr., of Lynchburg;

E. Randolph Williams, John W. Riely, Wirt P. Marks, Jr., John H. Bocock, William S. D. Woods, Thomas C. Gordon, Jr., and Lawrence E. Blanchard, Jr. of Richmond;

Edwin B. Meade and Frank Talbott, Jr. of Danville.

Views of Our Readers

■ Members of our Association are invited to submit short communications expressing their opinions, or giving information, as to any matter appearing in the *Journal* or otherwise within the province of our Association. Statements which do not exceed 300 words will be most suitable. The Board of Editors reserves the selection of communications which it will publish and may reject because of length. The Board is not responsible for matters stated or views expressed in any communication.

Important that Lawyers Should Act

■ The retiring President of the American Bar Association, Mr. Holman, made some very important statements in his annual address (35 A.B.A. J. 801; Oct. 1949) with respect to statism versus the traditional American individual enterprise system of government. In the main I find no fault with these statements.

However, I do wish to invite the earnest attention of my fellow members of the Association to Mr. Holman's statements (1) that as lawyers, it is more important for us to become articulate and do something about it than it is that we get better fees and (2) that if we would lay aside party labels, refuse to be moved by arguments based on expediency, put the long-range good of our country and its people above personal ambition, we could actually work the miracle of restoring the Constitution and its guarantees of liberty and property and preserve the rights of the people and the rights of the states against centralized power.

The lawyers have been articulate and have done something about the situation which is the theme of Mr. Holman's address. Indeed the lawyers have done a great deal about it! At page 825 of this same issue of the JOURNAL for October, 1949, Mr. Blaustein makes a statement—which seems to be entirely correct—that:

> Fifty-eight per cent of the legislators comprising the 81st House of Representatives are members of the Bars of their respective states, as compared to the 66⅔ per cent lawyer representation in the Senate. Of the 435 men and women in the lower chamber, 254 are attorneys, while the Senate's ninety-six-man body now possesses a lawyer population of sixty-four.

Thus the lawyer representation in each House of the Congress constitutes a majority in the respective Houses, and no bill can become law without the votes of at least a majority of those present constituting a quorum. Moreover, all the judges of the federal courts who interpret the statutes and the Constitution are lawyers and the vast majority of the principal staff—officers in the Executive-Administrative branch—are lawyers. Members of our profession have had a dominant part in establishing and applying the laws which have

converted our nation into a welfare state in the short space of some sixteen years.

It has always been true that members of the judiciary were and are lawyers. The high present-day proportion of lawyers in the law-making branch and in the executive-administrative branch has varied to some extent from time to time during past years but the fact remains that the advocates of statism, bureaucracy and the welfare state have made their greatest gains at a time when lawyers indubitably have been in the ascendency in the federal government in at least two of the three departments of our Government and exercised a powerful if not dominant rôle in the third one.

But it would be doing the lawyers in the Congress an injustice to assume that they willingly fastened statism, bureaucracy, and the welfare state around their own necks and the necks of their fellow-Americans.

The correct answer as to why this has occurred is found in the number and power of pressure groups. The methods followed by these pressure groups in securing legislation favoring their respective interests and then in securing latitudinarian interpretation of such legislation were sketched by me in addresses to numerous State Bar Associations and to the American Bar Association conventions when I was Chairman of the Special Committee on Administrative Law, some of which addresses have been published in *Americans on Guard*. Mr. John T. Flynn has recently described in his new book, *The Road Ahead*, the devious but effective manner in which a few of these groups have recently wrecked great governments.

Lawyers are not immune from the pressure at the polls of these selfish groups, members of which burrow into every avenue of propaganda. Even as I write some of these labor pressure groups have marked for defeat at the next election a large number of lawyer Senators and Congressmen while at the same time promising all possible support to other elective officers who have supported the programs of such pressure groups. In fact, these pressure groups have publicly announced their purpose and a few of them literally have millions of dollars in their treasuries and many votes to make effective their opposition or support.

The number of such groups is legion. A student has found Washington addresses for about 530 national associations or organizations. Statistics compiled by a Government agency shows that there are some 8,200 of these organizations and more than twenty years ago the *Chicago Tribune* published the information that there were then over four hundred of such organizations concerned with religion, reform, pacifism, or socialism and today there must be added the cells of communism.

I conclude this letter by a quotation from an address delivered by E. B. Gallaher of the Clover Manufacturing Company of Norwalk, Connecticut, on April 6, 1949, before the annual meeting of the American Ordnance Association wherein he stated, among other things, that:

> According to Government figures, our population may be divided as follows: There are 70 per cent who, when they reach maturity, have the intelligence of a 14-year-old child. About half of this group is classed as D-minus, representing those of very low intellect.
>
> This 70 per cent can do little or no thinking for themselves. They can initiate nothing and must depend entirely on others for leadership and for the direction of their thinking.
>
> There are 16 per cent having normal intelligence. They can initiate little, but they can be taught to do many things and do them well. They can acquire great knowledge.
>
> In this group we find small merchants, family doctors, office workers, foremen and many of our politicians.
>
> Then we have a group consisting of 9½ per cent, having high intelligence. These people are our planners, our managers. They include most of our top executives. Most of this group are highly educated.
>
> The final group, comprising 4½ per cent, have very high intelligence. They are our scientists, our great doctors, engineers, great business executives, great financiers. Their principal job is doing the thinking, planning and the development of ideas for others.
>
> With this picture in mind, it is not hard to find the cause of the difficulties the country finds itself in today.
>
> Primarily, the three top groups, comprising 30 per cent of our population, are to blame. Especially the two top groups representing 14 per cent, may be considered as directly responsible, for included in this group are the leaders of our industries.
>
> The vast majority of our population are true Americans at heart; are willing and anxious to work for what they get. Those of sub-normal intelligence, termed as D and D-minus, however, are usually seeking something for nothing. They realize their inability to do much for themselves; are not impressed too much by their personal freedom or our free enterprise system; are glad to take orders from anyone who promises them security and a living.
>
> Thus, this group of 100 million people has become the prey of the Communists, the Socialists, the unscrupulous politician and the labor leader.
>
> These sinister groups of men have promised these poor dupes that they would care for them from the cradle to the grave; all they asked for in return is their votes to keep them in office.

If the lawyers of America in private practice would give of their time for not more than a month during every campaign year in vigorously campaigning for able and conscientious men and women candidates for the United States Senate and the House of Representatives and for President of the United States, and in opposing just as strongly those candidates whose records show that they can not be relied upon to serve impartially *all* the people of the United States to the extent the Constitution of the United States authorizes and permits, then I agree with Mr. Holman that the rights and liberties of the American people, including their right to liberty of local self-government could be restored and preserved. Nothing less will do it before it becomes too late to do it at all.

O. R. McGuire

Washington, D. C.

The Nuremberg Trials "Victor's Justice"?

■ I read with interest Mr. Koessler's review of the Henry Regnery Co. publication of *Victor's Justice* by Montgomery Belgion, British author [36 A.B.A.J. 37; January, 1950]. This review is so vicious in its comments that I believe it should not pass unchallenged. The serious-minded reader of the book will emphatically disagree with Mr. Koessler's assertion that it is a cheap vilification of the high achievement that the Nuremberg Trial, Mr. Koessler again asserts, undoubtedly was. Such a reader would also differ with his conclusion that "it is an abusive misrepresentation of the noble purposes of those who engineered the trial."

This little work is a grave and closely-reasoned little volume. It is a real contribution to a controversial subject in which the author displays a keen insight, for a layman, into the legal principles involved. There is certainly need for this type of comment in a field surfeited with works of propagandists supporting the Nuremberg abortion. The substance of it is summarized in the quotation from T. S. Eliot with which it concludes: "We conceal from ourselves the similarity of our society to those we execrate." To call the conduct of the Nuremberg trials by the name of international justice, Mr. Belgion says, is to accept a notion voiced by Thrasymachus and refuted by Socrates in Plato's *Republic*, namely, that justice is "whatever serves the interest of the stronger".

Mr. Koessler makes some astounding statements in his review, one of which is that the author "presents fantastic allegations in justification of his bold accusation mostly based on journalistic reportage or otherwise insufficient documentation", that the victorious powers had by their own crimes disqualified themselves from sitting in judgment on defeated Germany. These so-called fantastic allegations include such Allied committed war crimes as the wholesale murders of civilian and noncombatants which took place in saturation bombings of German cities and towns with or without military value, the atomic destruction of Hiroshima, the mass deportations, extermination of minorities, imprisonments without judicial process, forced labor and the looting by all four armies of occupation before, during and after the Nuremberg trials. As for the "conspiracies against peace" on which Mr. Justice Jackson placed so much emphasis, Mr. Belgion had only to cite the Russian record in relation to Poland, Lithuania, Latvia, Estonia and Finland. Space will not permit citing the examples the author gives in refutation of the reviewer's absurd statement.

Another ridiculous statement by the reviewer is: "It is utterly untrue that at Nuremberg the victorious powers judged defeated Germany. Rather at Nuremberg, individuals of immaculate ethical and professional background were sitting in judgment over individuals charged with specific crimes." It does not take a lawyer to appreciate that the judge, like any other human being, is subject to the predilections acquired in the country of his domicile no matter how "immaculately ethical" he may be. It might be appropriate to speculate on what the finding would have been of a panel of either German or Japanese judges of a victorious Germany or Japan, "composed of men of unimpeachable integrity and of the highest moral fabric," if they had to pass on the war crimes of the Americans, the French, the British and the Russians. Mr. Belgion is concerned with proving that, under the principles accepted by the international military tribunal, the Nazi crimes in Europe would have been fully justified if Germany had won the war. The Nazis would have been equally justified in hanging, on the pretext of war guilt, whomever they pleased among the vanquished including, of course, those whom the opposite turn of fate made judges at Nuremberg. His argument is based first upon the obvious point that there can be no real justice where the purposes of prosecutor and judge are identical, and second, that the governments or armies of the nations whose representatives served as judges were those demonstrably guilty of crimes of the same character as those charged to the defendants.

The Russians, who had participated in the crimes of initiating war and stealing land, the crimes with which the Germans were charged, and who had collaborated with Germany, took part in the prosecution and sat on the bench with the other Allied judges to try their former partners in crime. This permitted them to and they did exclude from evidence the self-same documents that the American State Department has released and which would have shown them guilty of the same crimes. This is the new international "justice" which Mr. Belgion has the temerity to criticize. It appears to me particularly naïve for a representative of the American Bar to attempt to justify such procedure in view of the American Constitution, one of the fundamental tenets of which is that there must be a complete separation of the executive and judicial functions.

In this connection, it is interesting to note the condemnation of the trials by Major General J. F. C. Fuller, prominent British historian, as a throwback to barbaric revenge-taking and as a moral fraud, blaming the trials upon the "Jehovah complex", the Biblical code of revenge. He warned that vengeance on a defeated nation would lead to more terrible atomic destruction in the next war. He said that "all civilized people may one day curse" the precedent set up by the trials "that might is right and that the greatest crime in war is to lose it." The recent revolt of that eminent jurist of the Supreme Court of Iowa, the Honorable Charles F. Wennerstrum, who presided at some of the later Nuremberg trials, when he stated that he was disillusioned and concluded that the "victor is not the best judge of the war-crime guilt" is still fresh in our minds.

The war crimes trials, arranged by Britain, the United States, France and Russia in 1945, were born in an atmosphere of hatred and desire for

revenge. They were based on two major assumptions: first, that Germany alone was guilty of initiating and waging war; second, that nations, solely because they happened to emerge victorious, could constitute themselves a court of judgment upon the defendants simply because the accused happened to be on the losing side. Their aim was to present Germany to the world as the instigator of the war and impose upon it responsibility for its atrocities and in that way cover up the fact that President Roosevelt and many pseudo-statesmen in the United States and Europe were responsible in equal degree. It cannot be disputed that many Germans were guilty of crimes and that they could and should have been punished under existing laws. Nuremberg was not necessary for that purpose.

The defendants were, in the absence of applicable international law, condemned under *ex post facto* rules devised by the Court to suit its own convenience. The trials were cooked up by the war criminals of the four Allied powers to cover their own guilt. They have done an incalculable amount of harm and have failed completely in their purpose.

May we have more authors with the courage that Mr. Belgion has displayed and more publishers to publish such works.

PAUL W. TATGE

Chicago, Illinois

Welfare State Again

■ The annual address of retiring President Frank E. Holman, published in the October, 1949, issue, aroused in the writer a feeling of security in our government, which is a republic, and it assures me that government by law under our constitutional guarantees will be reestablished. Mr. Holman presented the difference between a "republic" and a "democracy" so simply and clearly that every person with a high school education or its equivalent could understand.

Our oath as officers of the court requires vigilant action on our part to repel the attacks against our form of government and the Constitution for the protection of ourselves and our clients.

I cannot conceive of a lawyer so devoid of an understanding of the limitations of power delegated to the government by the people in the adoption of the Constitution as Benjamin H. Kizer who, at page 1029 of the December issue of the AMERICAN BAR ASSOCIATION JOURNAL says, "that the Preamble to our Constitution provides that one of the reasons for establishing that more perfect union is 'to promote the general welfare' ", and implies that the preamble delegates to the lawmaking bodies power to do what in their judgment is best for the people governed.

The Bill of Rights was added to the Constitution to protect the people from the usurpation of powers by government.

B. C. HARVEY

Mount Vernon, New York

Disagrees with Mr. McKinnon

■ I am one of Harold R. McKinnon's fans, but think a statement in his last article "Are We Really Against Communism" [36 A.B.A.J. 5; January, 1950] is unfortunate and unfair. He says, "Masses of propertyless wage earners are dependent for their livelihood upon the caprices of their masters"! This implies a moral indifference to suffering due to industrial lay-offs that can not be justly charged to business executives today. I know of none who discharge good workers except as a matter of bitter necessity. "Caprice" is the wrong word. Except for those workers who chisel on it, is there any objection by businessmen to reasonable unemployment insurance? Industrial pensions, group life insurance and hospital plans covering millions of working men have been promoted by business executives. They have done so without pressure from the beneficiaries, and in many cases over the historic objection of labor unions.

I am sure Mr. McKinnon, on reflection, would edit his text. This is no time to carelessly fan the flame of class hatred.

SAMUEL B. PETTENGILL

South Bend, Indiana

Members of the Bar in England

■ There are two errors in the article about the English legal system in your December issue that I feel are sufficiently misleading to justify my correcting them.

The first was one which I should say was glaring even coming from an enthusiastic amateur. Mr. Bass wrote: "The Bar in England is divided into two completely clear-cut portions—barristers and solicitors."

This statement is true of the legal profession, but the Bar is one of the two branches. Solicitors are in no way connected with the Bar and what is more, no members of the profession can belong to both branches.

The second mistake is one which is less obvious but rather more important. It is not correct to say that only British subjects can read for the Bar—that was a wartime regulation which is no longer in force. We have several Americans over here who are members of different Inns of Court and who will be able to practice here after Call to the Bar. (They will then be barristers and not solicitors.)

ERIC STOCKDALE

Middle Temple
London

Balance of Power in Government

■ In endeavoring to give practical form to our plans to achieve peace through world understanding and some measure of world government we are accustomed to use the formation of the American Federal Union as an example and starting point. Our Federal Union was constituted with a two-way balance of power—functional balance between the judicial, legislative and executive branches of government—also a vertical balance between the central Federal Government and the distrib-

uted local state governments. Otherwise, the people would never have consented to a grant of sovereignty to the Central Government, notwithstanding the fact that distance, slowness of communication, and a much greater degree of self-sufficiency of families and areas afforded far superior protection from arbitrary exercise of power by the central government than is the case today.

Unfortunately, there has been, to a considerable degree, a break-down of the balance of power between state and federal governments and strong pressure exerted for a break-down of balance of power between judicial, legislative and executive departments in the United States.

It may be that for this reason many have been wary of premature surrender of any degree of sovereignty to an international government. All of us recognize that in the international sphere any federation of nations possessing sovereign powers must also be so organized as to insure both the balance of power between judicial, legislative and executive branches and the balance of power between international government and national government. Quite possibly, therefore, those ardently desiring immediate establishment of world government with powers of enforcement will best serve the cause by simultaneously seeking the reasons for instances of breakdown of balance of power in our own union and endeavoring to restore the balance in order that suitable safeguards may be provided in the international organization.

FREDERIC B. SCHRAMM
Cleveland, Ohio

Habeas Corpus and Extraterritoriality

(Continued from page 190)

filed petitions for *habeas corpus*, not in the Southern District of New York but in the District Court for the District of Columbia. And they did not bring the proceeding against the official of the Immigration and Naturalization Service who held them in custody, but against the Attorney General. The substantive issues tendered related to the interpretation and constitutionality of the 1798 statute, and the procedure followed in determining that these alien enemies should be removed to Germany. The Department of Justice was most anxious to resolve those issues which had been in constant litigation in the lower courts for a number of years, and to obtain an authoritative ruling which would permit us to wind up that phase of the alien enemy control program. But we pointed out to the Court the jurisdictional difficulties with a *habeas corpus* action brought in a district in which the petitioner was not being detained and against a respondent who did not have actual physical custody. At the same time we expressed our willingness to waive these objections in that particular case, if the defects were waivable, especially as these plaintiffs had brought proceeding upon proceeding in different courts in order to delay and prevent their deportation.

Court Cannot Issue Writ Unless Prisoner Is in Jurisdiction

The Supreme Court, however, decided that under the present federal *habeas corpus* statute—with its explicit reference to the grant of the writ within the "respective jurisdictions" of the various courts—no district court has power to issue *habeas corpus* where the prisoner is not confined within the court's territorial limits at the time of the filing of the petition. Since the restriction is one which Congress has placed on the power of the District Court to act, it could not be waived by the parties. But the opinion expressly leaves open—by way of a significant footnote—the "question of what process, if any, a person confined in an area not subject to the jurisdiction of any district court may employ to assert federal rights." 333 U. S. at 192, footnote 4. In that connection, Justice Douglas, for the Court, cited the seven cases, decided in October, 1946, that had denied American servicemen and civilians detained abroad leave to file original petitions in the Supreme Court. It may have some significance that he made no reference to the many German war criminal petitions which had been denied by a divided court, likewise on jurisdictional grounds.

In December, 1948, the problem of *habeas corpus* and extraterritoriality came front stage again in the case of the Japanese war criminals, but against a striking international background which dominated all the action. This was the well-known case of *Hirota* v. *MacArthur*. The petitioners were eleven high Japanese officials and military men who had been convicted by the International Military Tribunal for the Far East—the Far Eastern analogue of the Nuremberg tribunal—after a lengthy trial, of various war crimes: crimes against peace, conventional war crimes, and crimes against humanity, including murder. Some had been sentenced to death, others to imprisonment for life or a term of years. They were imprisoned in Tokyo by General Walton Walker, an American Army general, who was holding them pursuant to the direction of General MacArthur, as Supreme Commander for the Allied Powers in Japan, in accordance with the sentence of the International Military Tribunal. The respondents named were Generals MacArthur and Walker, who were in Tokyo, and General Bradley, Chief of Staff, Secretary of Defense Forrestal, and Sec-

retary of the Army Royall, who were in Washington.

Justice Jackson Breaks Deadlock

When the petitions were presented, the Court took the unusual step of setting them for argument. The four Justices (the Chief Justice, Justices Reed, Frankfurter, and Burton) who had continuously held that the Supreme Court had no jurisdiction to consider original petitions by persons detained in Germany, whether German war criminals or Americans accused of other offenses, declared that in their opinion there was the same lack of jurisdiction in the Japanese cases. In an unprecedented and most candid statement, Justice Jackson announced that he would break the deadlock that existed in the German cases by voting for a hearing in the Far Eastern matter in which he felt no legal disqualification, but added the hope that it would not be necessary for him to participate in the final decision. As it turned out, this hope was fulfilled. It is an interesting note that argument on behalf of the Japanese was made by a number of American lawyers, most of whom were flown by the Army from Tokyo for that purpose.

Two major issues were presented to the Court in the Japanese war criminals proceeding. The first was, of course, the same issue that had been mooted in the German cases: whether the Supreme Court has jurisdiction under its original or appellate jurisdiction to issue a writ of *habeas corpus* on behalf of these alien enemies detained in Japan. In its final decision the Court found it unnecessary to pass upon that point because it was persuaded that, even if general jurisdiction to issue the writ existed, the international nature of the tribunal which had tried and sentenced the petitioners foreclosed any relief in our courts. The International Military Tribunal for the Far East was not, the Court found, "a tribunal of the United States" and therefore the "courts of the United States have no power or authority to review, to affirm, set aside, or annul the judgments and sentences." The four Justices who had previously indicated their belief that the Court lacked general jurisdiction of such petitions for an original writ joined in this disposition on the merits, as did Justice Black. Justice Douglas concurred in the result for reasons to be stated in an opinion which has not yet been handed down.[1] Justice Rutledge reserved his vote, which also has not yet been announced. Justice Murphy dissented without opinion, and Justice Jackson took no part in the final decision.

This short unadorned *per curiam* opinion in *Hirota* v. *MacArthur* is truly a landmark in the developing relationship between our domestic courts and the activities of the increasing number of international agencies. This country is continuously engaged in international undertakings, and it is in the nature of things that American citizens, including American military officials, will participate in this work and carry on international functions, along with the nationals of other states. It would be most unfortunate for American courts to hinge a right to review, challenge, or supervise the work of such international courts or agencies on the fortuitous fact that Americans, subject to the court's process and jurisdiction, are part of the administrative machinery. Generals MacArthur and Walker, for instance, were executing the judgments of the International Military Tribunal for the Far East, a tribunal which, as we demonstrated to the Supreme Court, was not established under American law, or pursuant to solely American authority, but drew its life from international agreements and coöperative undertakings respecting the surrender and occupation of Japan. The tribunal's source of power and authority was not the law of any single one of the eleven participating nations, but the joint agreement of the eleven states acting in unison for a common goal. Its eleven judges represented as many nations. If American courts could review the judgments of such a tribunal because an American officer is designated to carry out its sentences, then certainly there is nothing to prevent British, French, Chinese, or other national courts from doing the same in comparable circumstances. The continued growth of world law, and the adoption of coöperative methods for the peaceful and judicial settlement of international disputes, would be certain to be adversely affected.

Our own history as a federal nation offers a most fruitful analogy to guide the relationship which should prevail between our domestic courts and international tribunals. In the middle of the nineteenth century, the Supreme Court of the State of Wisconsin—concerned with protecting the liberty of Wisconsin citizens—attempted to review, by writ of *habeas corpus,* the conviction by a federal court of a resident and citizen of Wisconsin, on the ground that the federal court's judgment rested on a statute which was asserted to be unconstitutional. In the great case of *Ableman* v. *Booth,* 21 How. 506, the Supreme Court of the United States was quick to strike down this attempt. The comments of Maryland's great son, Chief Justice Roger B. Taney, are peculiarly apt in the present situation. He pointed out that the United States and the states were separate and distinct governments and sovereignties. Although the federal prisoner was held within Wisconsin's territorial limits, that state's power was no greater than "if the prisoner had been confined in Michigan, or in any other state of the Union, for an offence against the laws of the state in which he was imprisoned."

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1. Mr. Justice Douglas's concurring opinion was handed down on June 27, 1949 (the last day of the October Term, 1948). The opinion takes the position that (1) a district court has general jurisdiction to issue the writ of *habeas corpus* in these circumstances, (2) the International Military Tribunal for the Far East was not a judicial tribunal but solely an instrument of political power, and (3) insofar as American participation is concerned there can be no constitutional objection to the Tribunal's political actions for the "capture and control of those who were responsible for the Pearl Harbor incident was a political question on which the President as Commander-in-Chief, and as spokesman for the nation in foreign affairs, had the final say."

"No one will suppose," Taney said, that the Federal Government "which has now lasted nearly seventy years, enforcing its laws by its own tribunals and preserving the union of the States, could have lasted a single year, or fulfilled the high trusts committed to it, if offences against its laws could not have been punished without the consent of the state in which the culprit was found."

If there is anything to Carl Van Doren's idea, in his book *The Great Rehearsal,* that our growth as a federal nation furnished a rough blueprint for the world order of the future, the Supreme Court's decision in the *Hirota* case can be said to have been bottomed on Taney's comparable holding a century ago.

Flick Case Holds U. S. Courts Have No Jurisdiction

The high court's decision on the international aspects of the Japanese war crimes trial has already borne fruit in the recent holding by the Court of Appeals for the District of Columbia Circuit in the German war criminal case of *Friedrich Flick* v. *Louis Johnson, Secretary of Defense,* decided May 11 of last year. Flick was a German industrialist who was tried and convicted by one of the military tribunals established at Nuremberg, in the American Zone of Germany, for the trial of lesser war criminals, after the conclusion of the prosecution of Goering and the other major war criminals by the International Military Tribunal. These later Nuremberg tribunals were composed of American judges, the prosecutors were American, and the officers executing the sentences were our nationals, but the authority for the tribunal's establishment came directly from the so-called Law No. 10 unanimously adopted in December, 1945, by the quadripartite Control Council for Germany, consisting of the American, British, French and Russian military commanders—the supreme governing body for Germany. The Court of Appeals for the District of Columbia Circuit looked upon the international source of the jurisdiction of the court which had tried Flick as decisive. It concluded, therefore, that the war crimes court was not a tribunal of the United States and under the *Hirota* decision the District Court, as well as all American courts, lacked power to review the judgment and sentence.[2]

The holding of the Court of Appeals applies to all war criminals tried in the American Zone by the Nuremberg courts established under Law No. 10 of the Control Council. But it does not apply to the larger number of Germans tried by purely American military commissions under American authority and not under Law No. 10. The courts set up at Dachau to try conventional war crimes such as the Malmédy massacres are an example. These courts are not in the same category as the "little" Nuremberg tribunals, and the *Flick* decision does not cover them.

As for minor *Japanese* war criminals, there is now pending in the Court of Appeals for the District of Columbia Circuit an appeal from the denial of the writ to two Japanese convicted by a war crimes tribunal in Japan which we have claimed is the analogue, in its international status, of the German courts passed upon in the *Flick* case. That case is *Shirakura and Watanabe* v. *Royall.*

Pattern Has Now Been Clearly Set

So much for the international implications of *habeas corpus* on behalf of war criminals. The *Hirota* and *Flick* decisions have made the pattern clearly. There have been recent developments indicating that we may soon also have an authoritative solution to the general jurisdictional question which the full Supreme Court has never reached—that is, whether any court of the United States has the power to issue the writ of *habeas corpus* where the prisoner, be he citizen or alien, is detained on foreign soil.

In the Supreme Court itself, in addition to the continued filing of German war criminal cases, two American civilians who were being held abroad in Japan and Germany for offenses against the occupation sought leave to present petitions. They were denied leave in April and May. In one, (*Bird* v. *Johnson,* 336 U.S. 950) the Court did no more than enter its denial. In the other (*In re Bush,* 336 U.S. 971), the unanimous order stated that the denial was "without prejudice to the right to apply to any appropriate court that may have jurisdiction". Last summer, Bush took that advice and brought suit in the District Court for the District of Columbia.

Bush was tried in Japan by a so-called provost court established for the trial of Americans not subject to court-martial jurisdiction but who are charged with offenses against the occupation or military government. Bird was held for trial in Germany by a court martial since, as a civilian employee of the Army, he was subject to military law. In Germany, civilians not subject to military law have been tried by specially constituted military government courts, as was the case in the well-known instance of Mrs. Ybarbo who shot her sergeant husband.

Meanwhile, the Court of Appeals for the District of Columbia Circuit has indicated that in its opinion there *is* such an appropriate court, and it is the District Court for the District of Columbia. A group of twenty-one convicted German war criminals, headed by one Eisentrager, who had been tried by a purely American military commission and were being imprisoned in Germany, filed their petitions in the District Court for the District of Columbia, rather than in the Supreme Court, as the others had done. They alleged that their confinement violated the Constitution, laws and treaties of the United States. The District Court dismissed for want of jurisdiction, in accordance with the long-standing practice in the District of Columbia going back to 1903.

On April 15, the Court of Appeals reversed, holding that the District Court did possess jurisdiction. *Eisen-*

2. Since this was written, the Supreme Court has denied Flick's petition for a writ of certiorari to review the Court of Appeals' decision. *Flick* v. *Johnson,* 338 U. S. 879 (Nov. 14, 1949).

trager v. *Forrestal.* In an exceedingly interesting opinion, Judge Prettyman held that, where issues of international authority are not present as in the *Flick* case, any person—enemy or friendly alien or citizen—can test the legality of a detention by American officials anywhere in the world by suit for *habeas corpus* against the superior officials within the United States who have directive power over the immediate jailer.[3]

Legislation has been suggested in some quarters which would permit suit in the District of Columbia or would authorize the Chief Justice of the United States or the Attorney General to designate certain district courts to receive and pass upon extraterritorial petitions for writs of *habeas corpus.* Extension of the writ abroad necessarily involves many choices of policy: whether aliens should have the right as well as citizens, servicemen as well as civilians, enemy aliens as well as friendly aliens; should the remedy be available at all times, even during the height of hostilities on foreign soil; whether suit should be required in the overcrowded District of Columbia courts; whether relief should be allowed before or only after a trial abroad; whether special provision should be made for waiving the production of the prisoner before the bar of the court; whether special time and procedure provisions are appropriate because of distances and difficulties of communications. These are all subsidiary problems which form a part of the major problem, and they are issues of the type normally left to Congress to resolve by appropriate legislation.

On the other hand, one cannot deny that there are substantial arguments in support of the Court of Appeals' holding that the writ is available under the present statutes—a position already espoused by at least three Justices of the Supreme Court with considerable vigor.[4] *Habeas corpus* is undoubtedly a fundamental writ in our system of government, and perhaps Congress is required by the Constitution to open our courts at all times to any person held anywhere under American control.

Whatever the correct resolution of the problem of *habeas corpus* and extraterritoriality under our present laws—and we may soon have the definitive answer—there is no doubt that the issue is a vital and provocative one, which has called forth much consideration and division of opinion.

It should not be a matter of surprise that lawyers and even the Justices of the Supreme Court differ sharply on such an issue. Fifty years ago, when a similar problem of the extent to which the Constitution follows the flag was presented to our highest court in the Insular Cases, involving the status of the newly-acquired island possessions, and the series of differing opinions which make up fully half of Volume 182 of the United States Reports were handed to the world, Finley Peter Dunne's Mr. Dooley remarked: "Mr. Justice Brown delivered the opinion of the Court and only eight justices dissented." And when the constitutionality of the famous gold clause legislation was upheld someone is accused of saying, "The Supreme Court sustained it, nine justices dissenting."

3. A petition for a writ of certiorari was filed on Sept. 1, 1949, and was granted on Nov. 14, 1949. 338 U. S. 877. The case—under the title *Johnson* v. *Eisentrager,* U.S.S. Ct., Oct. Term, 1949, No. 306—is now awaiting argument, and will probably be heard in March or April, 1950.

4. In his concurring opinion in *Hirota* v. *MacArthur,* filed on June 27, 1949, Mr. Justice Douglas expressly stated his agreement with the decision of the Court of Appeals in the *Eisentrager* case.

New Commercial Code
(Continued from page 182)

is an ever-increasing volume of foreign transactions in which American merchants and manufacturers are involved, and when the use of domestic credits is steadily increasing, it is highly desirable that this field be covered in the Code.

Article 6 on foreign banking is in the same category. Entirely new, it too fills a great need in these days of expanding foreign trade.

Article 7 Replaces Three Uniform Acts

Article 7 on documents of title covers the ground now covered by the Uniform Bills of Lading Act, the Uniform Warehouse Receipts Act and a few sections of the Uniform Sales Act that are largely duplicated by provisions in the Warehouse Receipts and Bills of Lading Acts. However, all provisions of the Uniform Warehouse Receipts Act and of the Uniform Bills of Lading Act making violations of the requirements of the acts criminal offenses have been omitted as being inappropriate in this type of Code.

In this article an effort is made to generalize the law relating to documents of title, regardless of the type of transaction in which they may be involved. Nevertheless, it is so written that neither bills of lading nor warehouse receipts will lose their identity or become submerged in any way; and it is so flexible that it will cover, not merely existing forms of documents of title, but any forms which may be developed as new commercial practices develop.

This article also makes a number of improvements in the law which have been advocated for some time by those engaged in warehousing.

Article 8 on investment securities deals with bearer and registered bonds, formerly covered by the N.I.L. certificates of stock, formerly covered by the Uniform Stock Transfer Act, and additional types of investment paper not heretofore covered in any uniform statute. It does not relate to paper falling within the scope of the article on secured commercial transactions—conditional sales, trust receipts, and the like.

As in the case of other articles, there is much in this article that is new. Numerous provisions relate to subjects hitherto dealt with only in case law. In addition, the provisions of the N.I.L. and of the Uniform Stock Transfer Act have been re-

stated and clarified in such a way as to give real hope of uniformity of law in this very important field.

Article 9 Covers Problems in Secured Financing

Article 9 covers in a novel way the field now covered by conditional sales acts, chattel mortgage acts, and the Uniform Trust Receipts Act.

It does not deal with its subject matter under the hitherto-used terminology but covers instead the problems inherent in secured financing as a unit whether the subject matter be consumer goods, equipment, farm products, inventory or accounts receivable. It does not regulate matters covered by statutes like the small loans acts or the retail installment selling acts, but does deal with the requisites of a legally enforceable financing agreement and the consequences of such an agreement, especially to third parties to the transaction. The differences in consequences that now result from historic accident have been eliminated.

When adopted, this article will greatly simplify and unify the handling of personal property of any kind on a part-payment plan. It is believed that it is one of the great steps forward embodied in the Commercial Code as a whole.

The remaining articles deal with bulk sales and effective date and repealer. Attention has already been called to the controversy—still unsettled—as to whether the law of bulk sales should be included in a commercial code.

In Article 11 it is suggested that each legislature enacting the Code should make it effective December 31 of the year in which it is passed. Thus, the public, and especially the business community, will have a number of months before the Code becomes effective to become familiar with the changed provisions of law regulating their transactions.

It is also suggested that the Code should in every case specify with particularity the local acts or parts of acts which are repealed and displaced by it.

Code Was Drafted Under Editorial Board of Five

Now a word as to those who have been especially active in the preparation of the Code.

To integrate and supervise the work an editorial board was created consisting of Judge Herbert F. Goodrich, United States Circuit Judge for the Third Circuit; Professor Karl N. Llewellyn, the chief draftsman of the Code; and three practicing lawyers—J. C. Pryor, of Burlington, Iowa; Harrison Tweed, of New York, New York; and the writer of this article.

The associate chief draftsman of the Code is Soia Mentschikoff, presently a practicing lawyer in New York, but lately a professor of law at Harvard University.

Both Mr. Llewellyn and Miss Mentschikoff approach the drafting of an all-embracing Code relating to commercial transactions with the purpose of making it consistent with things as they are, rather than with the idea of putting in statutory form a mass of nice theories that do not conform to realities.

The draftsmen of the various articles of the Code have been, in the main, prominent members of the faculties of leading law schools. They were selected for these assignments because, by and large, law teachers have at their command the facilities and are able to be allowed the time necessary for the preparation of legally sound drafts of parts of a statute which, in addition to being realistic, must be prepared against a background of complete knowledge of the law of the field covered.

Entire Code Debated at Length

The entire Code has been considered and debated at length and in detail by the entire Council of the American Law Institute and by either the Commercial Acts Section of the National Conference or its Property Acts Section, or both.

The Council and these two Sections have had on them throughout the work of preparing the Code, lawyers and judges from all over the United States, thus bringing to its consideration the full benefit of points of view reflecting differing commercial practices in every part of the country. North, South, East and West, the Atlantic and the Pacific seaboards, cities and towns, agricultural and industrial areas, have all had spokesmen in these groups.

However, before the various portions of the Code ran the gauntlet of the Council of the Institute or of the Sections of the Conference, they were thoroughly considered by groups of so-called "advisers"—judges, practicing lawyers and law teachers—who met with the draftsmen from time to time—and often—to debate and thrash out, not only the substance, but the form and phraseology of the several drafts.

In addition, there were many, many informal consultants who frequently advised with the draftsmen to insure a Code that will work. Practicing lawyers, hard-headed businessmen, operating bankers and financiers, have all given generously of their time and knowledge so that, not only current business practice, but foreseeable future developments would be clearly provided for.

Space does not permit the mention of the names of the members of the Council of the Institute and of the Sections of the Conference who devoted weeks of time to a thoroughgoing consideration of the Code's provisions before they came before the meetings of the Institute and the Conference; but it would be unfair to omit the mention of the draftsmen and their advisers who have devoted many thousands of hours to the detailed work of draftsmanship.

From the Bench, the Institute and the Conference drafted Judges John T. Loughran, of the New York Court of Appeals; Thomas W. Swan, United States Circuit Judge for the Second Circuit; and the late John D. Wickhem, of the Supreme Court of Wisconsin.

The practicing lawyers were Howard L. Barkdull, of Cleveland, Ohio; Lawrence G. Bennett, of New York, New York; Harold F. Birnbaum, of Los Angeles, California; William L.

Eagleton, of Washington, D.C.; H. Vernon Eney, of Baltimore, Maryland; Fairfax Leary, Jr., of Philadelphia, Pennsylvania; Willard B. Luther, of Boston, Massachusetts; Frederic M. Miller, of Des Moines, Iowa; Hiram Thomas, of New York, New York; Sterry R. Waterman, of St. Johnsbury, Vermont; and Cornelius W. Wickersham, of New York, New York.

The law teachers were Ralph J. Baker, of the Harvard Law School; William E. Britton, of the University of Illinois Law School; Charles Bunn, of the University of Wisconsin Law School; Arthur L. Corbin, of the Yale University Law School; Allison Dunham, of the Columbia University Law School; Grant Gilmore, of the Yale University Law School; Albert J. Harno, of the University of Illinois Law School; Friedrich Kessler, of the Yale University Law School; Maurice H. Merrill, of the University of Oklahoma Law School; William L. Prosser, of the University of California School of Jurisprudence; Louis B. Schwartz, of the University of Pennsylvania Law School; and Bruce Townsend, of the University of Indiana Law School.

And, although they are not judges, lawyers or law teachers, Wilbert Ward and George B. McGowan, of New York, gave valuable assistance to the editorial staff on those parts of the Code relating to bank collections, letters of credit and foreign banking.

Code Is Now in Final Stages

The Code is now in the final stages of editing and polishing.

By the time this article is published, a new edition with comments will be on the printing press. It is highly desirable that lawyers throughout the United States study this edition of the Code, so that if they have any criticisms or suggestions, they may make them before the Code's final adoption at the joint meeting of the American Law Institute and the National Conference of Commissioners at Washington in May of this year. Copies may be obtained by writing to the office of the American Law Institute, 133 S. 36th Street, Philadelphia 4, Pennsylvania; and criticisms and suggestions should be mailed to that address.

One final word:

While the Code has been prepared primarily for introduction into the state legislatures, there has been much discussion of the desirability of having it enacted by Congress to apply to interstate transactions. This could be done with a very few modifications of the text of the state act, although it is universally conceded that Article 9—Secured Commercial Transactions—should be omitted from a federal act. Obviously, should the Code be enacted by Congress, that step alone will result in greater uniformity in commercial law in the United States than has ever heretofore been attained; for today a very large part of the nation's business is interstate. And if Congress enacts the Code to govern all interstate commercial transactions, there would be a tremendous incentive for every state to write the Code into its statutory law without the slightest delay.

If complete uniformity of law covering all commercial transactions—interstate as well as intrastate—could be accomplished with reasonable promptness, there would probably be no disagreement that this would constitute one of the greatest achievements in the history of American law.

National Health Insurance

(Continued from page 201)

set aside at will in one state or another whenever local policy prefers the rule of *laissez faire*. The issue is a closed one. It was fought out long ago. When money is spent to promote the general welfare, the concept of welfare or the opposite is shaped by Congress, not the states. So the concept be not arbitrary, the locality must yield. Constitution, Art, VI. Par. 2.[16]

Since the *Butler* case was not explicitly overruled, some lawyers apparently entertained a lingering hope that the Tenth Amendment might yet be made to restrict the granted powers of Congress. That hope was blotted out, one would think forever, by *United States* v. *Darby*:[17]

Our conclusion is unaffected by the Tenth Amendment which provides: "The powers not delegated to the United States by the Constitution nor prohibited by it to the states are reserved to the states respectively or to the people." The amendment states but a truism that all is retained which has not been surrendered. There is nothing in the history of its adoption to suggest that it was more than declaratory of the relationship between the national and state governments as it had been established by the Constitution before the amendment or that its purpose was other than to allay fears that the new national government might seek to exercise powers not granted, and that the states might not be able to exercise fully their reserved powers.

Against this background, the validity of national health insurance is well-nigh axiomatic.[18] The pay roll taxes will be valid taxes, and it will be immaterial that their proceeds will presumably be earmarked for a particular purpose or that they will form a part of a system of social insurance. The only novel question, the only question not prejudged by the Social Security Cases, will be the propriety of the expenditures. And the sweeping definition that those cases gave to the spending power leaves little doubt of the decision on this question.

Poor Health Impairs General Welfare As Does Poverty

If federal expenditures are proper to prevent death by starvation, they

16. It is worthy of note that Mr. Justice Cardozo's opinion in *Helvering* v. *Davis* received the concurrence of six other members of the Court, including Roberts, J., who had written the *Butler* opinion, and the Chief Justice and Justices Sutherland and Van Devanter, who had concurred in it. Only Justices Butler and McReynolds dissented.

17. 312 U. S. 100. This case sustained the Fair Labor Standards Act of 1938, and overruled *Hammer* v. *Dagenhart*, 247 U. S. 251.

18. I am speaking here of the validity of the basic plan, which is what Mr. Martin and the Association have attacked. No one could predict at this stage whether some particular provision or clause of a bill, which may be much amended before it emerges from Congress, might not meet serious constitutional attack.

must also be proper to prevent death by disease. If poverty short of starvation is an evil with which Congress may deal, so is ill-health short of death. If the one may be mitigated by payments to individuals without a means test, the other may be relieved by services to individuals on like terms. If widespread lack of economic resources impairs the general welfare of the Nation, so too does widespread lack of good health.

Federal expenditures to promote the health of our citizenry are of too ancient an origin and too firmly established to admit of serious question. In a field of expenditure lacking any comparable history—the use of federal funds for the construction of low-cost public housing—the Supreme Court contented itself with citing the *Butler* and Social Security Cases as conclusively establishing the validity of the statute.[19]

There is already before Congress a huge mass of evidence on the subject of national health insurance. Even leading opponents of compulsory insurance advocate substantial federal expenditures for the explicit purpose of making medical care more widely available. At least those opponents can hardly challenge the validity of spending for this purpose.[20]

I do not argue here, or need to argue—though I firmly believe—that the evidence in support of compulsory national health insurance outweighs the evidence against it, and that its enactment will promote the general welfare of the Nation. I do argue, however, that the weighing of the evidence and the choice of measures which will best serve the general welfare are functions which the Constitution entrusts to the Congress. That much, I think, is at the present time beyond the realm of serious debate.

19. *Cleveland v. United States*, 323 U. S. 329.

20. It has occasionally been suggested that an expenditure for a certain purpose may be proper if the expenditure consists of grants to the states but improper if it is for disbursement directly by federal officers. (See, e.g., Cong. Rec., April 14, 1949, page 4660). Nothing in the Constitution or in any decision I know of lends the slightest support to the view that the "general welfare" expands or contracts with the channel through which the money is to be spent. Perhaps the misconception stems from the fact that grants-in-aid appear to be immune, on jurisdictional grounds, to constitutional attack. That fact, of course, has no bearing whatsoever on the substantive authority of Congress to spend funds for any given purpose.

Melville Weston Fuller

(Continued from page 186)

usually pitied. But, as Henry James has pointed out so graphically in his novel, *What Maisie Knew*, such a child sometimes gains an early education in diplomacy which is valuable to him all through life. This result is even more likely to occur where the divorced parents marry again and where there are large groups of relatives on both sides to be propitiated by the child. Certainly this influence can be traced in the life of Melville Fuller. Everyone who knew him comments on his urbanity and his diplomacy. He was always careful what he said. He never took sides unnecessarily. He had a passion for conciliation rather than dispute.

For several years after her divorce, Catharine Fuller, with her two small boys, lived with her father, Chief Justice Weston, in Augusta. She made her living by giving piano lessons.[5] She bought her sheet music in Boston from a young man named Oliver Ditson. Ditson took more than a commercial or musical interest in his Augusta customer.[6] He mentioned in his letters his tender regard for her son "Mellie" and the Fuller library at Bowdoin College contains a book given by Ditson to Melville W. Fuller when the boy was seven.[7]

Catharine Fuller was a tiny woman of intense verve. She fought like a tigress, against the parsimony of her father, to secure an education for her sons. Every penny that she could save from her piano lessons went into their schooling.

As boys, Henry and Melville Fuller slept in a below-zero bedroom. There were no furnaces, no stoves, no storm windows in those days—houses were warmed by open fires. There were no matches, no lamps, no plumbing; in fact, as Senator Hoar said, no new household comforts or conveniences for everyday living had come into use since the time of the Romans two thousand years before. The twenty years, from 1830 to 1850, were to see great advances in these respects.

Books Became Fuller's Chief Interest

Melville and Henry sledded and fished and played crack-the-whip and one-old-cat. But books soon became Melville's chief interest in life. Judge Weston had a fine library and the boys soon started to build their own. Many of the books in Fuller's library contain inscriptions in a child's hand, such as: "Library of H. W. and M. W. Fuller, shelf 7 book 82." He was a methodical little boy, a merit that did not abate as he grew older. He was also fussy—"persnickety" is the New England term. One of his early books contains this inscription in his childish handwriting: "Whoever reads this book let him not think I bent the leafs as I did not. M. W. Fuller." This methodical turn and painstaking attitude—rare in a person of his brilliance and facile speech,—was one of the secrets of his professional and judicial success.

The most vivid impression of Melville's boyhood (and one which had a profound effect upon his life) was the trial when he was seven, of his mother, his grandparents and his Uncle Daniel before the South Parish Church for permitting children

5. Mrs. Nathan Weston, Augusta, to Mrs. William Dewey, Philadelphia, June 2, 1836 "Catharine has a class of music scholars"; same to same, September 5, 1836, "Catharine had four weeks' vacation from her duties as music teacher. She went to Portland after vacation & had a nice time. She took Melville with her for the benefit of his health & it did him a great deal of good"; same to same, February 11, 1839 "Catharine has done a great deal with her scholars and about Thanksgiving time she exerted herself too much in that way", Genet papers.

6. Several letters from Ditson are in the Genet papers. He was the founder of Oliver Ditson & Co., the music publishing house. His biography is in Dictionary of National Biography, V, p. 321.

7. Oliver Ditson to Mrs. C. M. Fuller, June 20, 1841, Genet papers. The book is Lee's *Historic Tales* (Boston 1840).

to dance square dances in their home.

In the early 1800's such dances had taken place in the presence of the minister with no restraining frown, but in the 1830's qualms began to arise. Dances to music seemed "pleasure loving" and inconsistent with true piety. A committee of the South Church was appointed to consider the question. It reported that dancing encouraged an undue love of dress, display and admiration; and nourished levity, vanity, pride and envy; it "increased the natural aversion to the duties of religion." The report was adopted by the church.

Westons Refuse to Yield to Church

The Westons did not agree with it. More important, they did not concede that the church could control their conduct in such things. Soon thereafter, when a group of young people were attending a party at the Weston home, they danced; Melville's mother played the piano and his Uncle Daniel, the violin. A month later Daniel Weston, who was then a young lawyer in Augusta, published a vindication of the minority view of dancing. A secret caucus of selected church members was then called by the Pastor, the Reverend Benjamin Tappan, a stern Puritan, to consider "what should be done with Judge Weston's family". A long, painful church trial ensued and, though Chief Justice Weston conducted it with consummate skill, it went against the Westons. As soon as the charges were made, all the accused were by vote requested to abstain from the communion.

After several harrowing hearings Judge Weston pressed for a decision. The pastor's party indicated that such proceedings sometimes took two years. At this Melville's mother fainted, and Judge Weston, turning to the pastor, said: "This affair must be brought to a close. You will kill my wife and daughter. I don't know but what you have killed my daughter." It was only by the greatest efforts of Judge Weston's friends that the excommunication was softened by a resolution to the effect that the "oversight of the Church" over Chief Justice Weston and his wife should cease. Daniel Weston was excommunicated outright. Mrs. Fuller, on her own request, was dismissed and recommended to St. Marks Episcopal Church, which the family thereafter attended.

These are the bare facts, but there is more in the atmosphere of the case.

One of the complaints of the South Parish Church against Daniel Weston was that, in his argument on behalf of his mother, he had stated that the church had tolerated an "outrageous crime" by one of its members. Daniel Weston's basis for this charge was that the Reverend Thomas Adams, Editor of the *Temperance Gazette*, had published a gross libel upon Daniel's brother, George Melville Weston, who was then the Democratic County Attorney of Kennebec County.

Most Democrats Were Episcopalians

The Puritan Church was Federalist and Whig. Its Democratic members were at first regarded as harmless, even charming, eccentrics. There is no country where originals are more valued than in the back country of New England. But in the reign of Jackson this eccentricity had lost its charm. Democrats were made uncomfortable in the Congregational Church and many of them joined the Episcopal—perhaps the least democratic in spirit of the churches. But it offered the best hope of a union of all minorities against the dominant religion and politics.

Melville Fuller, although baptized in the Congregational Church, was a lifelong Episcopalian. He was raised in an atmosphere of resentment against Calvinism. In later life he sometimes ironically referred to his hero, President Cleveland, as "the Presbyterian young man". And Fuller's adherence to the Democratic party never wavered until the days of Bryan; Fuller voted against Lincoln in 1864. There is no stronger party man than one who has suffered social ostracism for his politics.

In December, 1844, eleven years after her divorce, Catharine Fuller was married to Ira Wadleigh who was engaged in the logging business at Old Town, near Bangor, on the Penobscot River. Melville, who was a very emotional and sensitive child, was desolated by his mother's remarriage. Her letters to his grandmother describe his jealousy and tears. "Melly knows," she wrote, "that I love him best but he argues and argues till I am half dead. . . The poor baby is in a perfect agony and says he will try to overcome his jealousy."[8] After his mother's marriage, Melville lived much of the time with his grandparents in Augusta.

The year after her marriage, Catharine Fuller took a trip with her husband to the Far West—Wisconsin—to see about logging prospects there. They went to Boston by coastal ship, visiting there Oliver Ditson, who had a baby boy, four days old; thence to Stonington, Connecticut by the "cars" (the engine broke down on the way); then to New York by ship;

8. C. M. Wadleigh, Old Town, to Mrs. Nathan Weston, Augusta, February 18, 1845, Genet papers.

thence up the Hudson to Albany by river boat and then on the cars and horse and wagon to Buffalo. From there they took a lake steamer, to "Milwaukie", Wisconsin,—a five day trip on the Great Lakes. From Milwaukee Mrs. Wadleigh wrote to her mother: "This country is settled by N. England people and you can feel more at home than in any place between here and Maine. Tell Pa he is well known here and spoken of with great respect. Mr. W. [Wadleigh] says, if Pa would come out here, in 2 years he would be king of all he surveyed. . . I am perfectly willing to come out here if it is best for the boys."[9]

Letter Describes Visit to New York State

The next year when he was 13, Melville was taken on a visit to Duanesberg, New York, by his Uncle Daniel. A letter dated "Satteday", May, 1846, describes the journey: "We had a very smooth night coming to Boston. We went to the United States Hotel. After breakfast, we visited for awhile. Went into Ditson's store. He was out. Uncle Daniel had a little business to do so he left me for a little while. By and by he [Ditson] came in. He didn't recognize me. I did him though. I asked him if he knew me. He said he didn't know that he did. Then I told him and he shook hands and talked. He appeared glad to see me. I saw the Old South Meeting House and Brattle Street Church with the cannon ball in it and I saw the Temple and the Tremont House and walked in the Common. I saw Quincy Hall, a description of which I have seen in the Age." The letter continues with similar details of the sights in New York where his uncle left him on his own and Melville went to the theater: "I went to the Pit. Price was 50 cts. The play was The Beggar on Horseback, a Comedy. It was not very good but there were some pretty fair things said in it. I thought they didn't pronounce so well as they might. They pronounced Worse, Wus, &C, &C."[10]

The boy's affectionate nature is shown by his fascination with pets. In one letter from the farm in New York he mentions, the hens and little chickens, turkeys and little turkeys, pigeons, sheep and lambs, cats and kittens, a pony and a pet turtle. Already he had apparently read much of Dickens—he named the turkeys "Oliver Twist", "Barnaby Rudge" and "Nicholas Nickleby" and the turtle "Quilp". He wrote: "I have been reading a novel by Dumas called 'Marguerite du Valois' and I think Grandpa would like it as well or better than Matilda. Give my love to him. I am glad he has so great a case to attend to. Write me all about it."[11]

When he was thirteen, war with Mexico occurred. As frequently happens, his memory of the war centered around an almost irrelevant incident. His Aunt Abby's husband, the Rev. John H. Ingraham, was chaplain of the state Senate, and every day he prayed that the enemies of the Republic might be "smitten, hip and thigh." The literal picture raised in the boy's mind of this rear attack upon the Mexicans tickled him, and he remembered it all his life. His sense of the ridiculous was always one of his most endearing traits.

Visit of President Polk Impresses Melville

In 1847, when Melville was 14, President Polk visited Augusta with James Buchanan, Secretary of State, and Nathan Clifford, then Attorney General. The President stayed all night

9. C. M. Wadleigh, Milwaukee, Wisconsin, to Mrs. Nathan Weston, Old Town, Maine, September 6, 1845, Genet papers.
10. Genet papers.
11. Melville Fuller, Duanesberg, New York, to Mrs. Nathan Weston, Augusta, Maine, June 10, 1846, Genet papers.

at Aunt Sarah Williams' house. Her husband, Reuel Williams, had known the President when Williams was in the United States Senate and the President was Speaker of the House.

As Melville listened to the President's speech, he heard perhaps for the first time the vibrations of a coming conflict. Ours was the noblest structure of human government ever devised by the wisdom of man, said the President. But it was founded on compromise and mutual concession, and whoever should disturb those sacred compromises would "destroy this fairest fabric of human wisdom and inflict an irreparable evil upon mankind." "Sir," said the President, "how shall the local jealousies that disturb us compare with the great object of binding and continuing this free and happy people." Melville was impressed.

In May, 1849, the Dialectic Club of Augusta was organized with Melville Weston Fuller as President. He was then 16. Many such clubs were organized in New England in this period at the suggestion of Lyceum speakers. Education and self improvement were then the passion of the people. According to the printed catalogue of this club, it was "founded for mutual improvement" but it was particularly devoted to "exercises in discussion and composition." It had a library of ninety volumes. Among them was *Scenes in a Vestry*, which Melville's Uncle Daniel (who had become an Episcopal clergyman) had written to tell the story of the Weston expulsion from the Puritan Church. There was also in this library a long poem called Philo, written by Sylvester Judd, Jr., the Unitarian minister in Augusta, who had married one of Uncle Reuel Williams' daughters. Sylvester Judd was a good friend of Emerson and Judd's novels, *Margaret* and *Richard Edney* (descriptive of the Augusta scene in the forty's and before), were much read, and *Margaret* was praised in print by James Russell Lowell. The Dialectic Club also had a mineralogical cabinet with 200 specimens collected by the members. The printed programs of the club show M. W. Fuller as taking the parts of Macbeth and Brutus, Mr. Blushington in scenes from *The Bashful Man*, Sir Anthony Absolute in scenes from the *Rivals*, and Samson Slasher in the "laughable farce, Slasher & Crasher." In June of 1848, he was the Lecturer at the annual exhibition of the club; in 1850 he was the Orator at its anniversary, and, in the same year he was elected its Poet.[12]

12. Catalogue of the Dialectic Club of Augusta in Bowdoin College Library; many programs of Dialectic Club in Genet papers; letter Henry Clark, West Poultney, Vermont, to M. W. Fuller, Augusta, October 26, 1850, asking for copy of Fuller's oration before Dialectic Club on May 30, 1850, Genet papers.

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Uniformity of Law

(Continued from page 178)

formity of Judicial Decisions. In 1936 the Conference took another step; it amended its constitution so as to insert in it a clause including among the objects of the organization the following: "to promote uniformity of judicial decisions throughout the United States." Notwithstanding the expedients just mentioned, uniformity of interpretation has not been completely achieved.

Goal of Uniformity Has Proved Elusive

Although the goal of uniformity has proved to be an elusive one in America, the work of the Conference has taken us a long way toward it. Most states, in enacting a uniform measure, do so without altering its provisions and, generally, courts, upon realizing that the controlling statute was adopted for the purpose of achieving uniformity of law, give effect to the purpose. In the short space of a half century the Conference has made commendable headway. A valuable by-product of its efforts is the fact that the clarity and brevity of the acts that it has drafted serve as models of statutory composition. In all events, the Conference has blazed the course that leads away from Washington and to uniform state legislation.

The experience of the Conference in the past fifty years or more has revealed improvements in its methods pertaining to public relations which should be adopted. The present appears to be a propitious time to overhaul its methods, discard mis-

taken ones and embrace better mechanics. Shortly the Conference, acting in conjunction with the American Law Institute, will submit to the states for legislative enactment the Uniform Commercial Code, which both organizations are writing as a joint undertaking. This new measure is by a wide margin the most important that the Conference has ever undertaken. Wherever enacted into law it will supersede the Negotiable Instruments Law, the Sales Act and the Warehouse Receipts Act. In addition, it will contain many auxiliary provisions applicable to other phases of commercial, trading and banking transactions. Obviously, the advent of this important measure will be a favorable time to enlist anew public interest in uniformity of state law, to correct errors in methods and to embrace new tools which offer promise of better results.

Not only does the impending offer of the Commercial Code point to the year ahead as an auspicious one, but in the half century that has passed since the Negotiable Instruments Law began to make legislative headway other developments have occurred which make the future look brighter for the consummation of the Conference's efforts. Since the formation of the Conference many other organizations have been created which may be depended upon to enlist their strength in behalf of uniform law. One of these is the Conference of Governors; another with which the Commissioners' Conference already has a connection is the Council of State Governments.

Those two, as well as many trade associations, are capable of yeoman service with statutory enactment. Other organizations worthy of consideration are those which the judiciary has created. They may be willing to lend an attentive ear to those who wish to speak in behalf of uniform interpretation. An organization of that kind is the Section of Judicial Administration of the American Bar Association. Still another, recently created, is the annual Conference of State Chief Justices. A development which can be helpful is the increasing consciousness that if more branches of jurisprudence are piled upon the shoulders of the Federal Government the burden will be unbearable. Then, too, we now realize fully that closely following expanded federal jurisdiction roll the tumbrels that carry state jurisdiction to its fate. Finally, a factor which points to the present as almost providential is the fact that the enactment of the Commercial Code will repeal the Negotiable Instruments Act, which the critics insist has been the principal victim of diverse judicial interpretation.

Uniformity of state law pertaining to commercial matters need not forever remain only a mirage. Possibly the dawning of the new day may produce a second Lyman D. Brewster. Maybe the importance of the code will return to the Conference the evangelistic spirit that unfortunately forsook it when it began to produce short acts of the tinkering type. The crusading fire which animated the Conference when the Negotiable Instruments Law was offered to the states enabled it to overcome successfully the determined opposition of such a learned opponent as Professor James Barr Ames. Leadership in the art of draftsmanship is good, but the hour calls for leadership in legislative enactment.

Discordant judicial interpretation is not an inevitable consequence of our fifty-three separate and independent jurisdictions. Nor are the states wedded so irrevocably to individualistic state law that no divorcement is possible. Commerce is a leavening influence which can be depended upon, and no state wishes to be bypassed by progress merely for the satisfaction of maintaining a prima donna rôle. No state, through failure to give attentive consideration to the need for uniform legislation upon the subject of this new act, will want to be singled out as the one that afforded occasion to resort to Washington.

Now is the time to renew our efforts toward our delayed goal of uniformity.

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